2016

Chevron Bias

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ABSTRACT

This Article takes a fresh approach to Chevron *deference.* Chevron *requires judges to defer to agency interpretations of statutes and justifies this on a theory of statutory authorization for agencies. This Article, however, points to a pair of constitutional questions about the role of judges—questions that have not yet been adequately asked, let alone answered.*

One question concerns independent judgment. Judges have a constitutional office or duty of independent judgment, under which they must exercise their own independent judgment about what the law is. Accordingly, when they defer to agency interpretations of the law, it must be asked whether they are violating their duty to exercise their own independent judgment.

A second question concerns systematic bias. Under the Fifth Amendment right to the due process of law, judges cannot engage in systematic bias. Therefore, when they defer to agency interpretations of the law, it must be asked whether they are engaging in systematic bias in favor of the government and against Americans, thus denying them the due process of law.

These constitutional questions require judges to reconsider Chevron. *Rather than dwell on the usual statutory question about authorization, judges (including lower court judges) need to focus on the constitutional questions about their own role.*

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INTRODUCTION

So much has been said about *Chevron* deference that one may doubt whether it is worth saying more. Strangely, however, the key constitutional questions have been neglected.

Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, where an agency has statutory authority to interpret its authorizing statute, judges must defer to its interpretation.[1] The conventional

[1] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984). For details of the *Chevron* test, see *infra* text accompanying notes 15–16.

question about deference thus focuses on the statutory authority for agencies to interpret. There are other questions, however, which are more central for judges.

First, even where agencies have congressional authority to interpret, how can this relieve judges of their constitutional office to interpret? Put another way, even where agencies have congressional authority to exercise their judgment about what the law is, how can this excuse the judges from their constitutional duty, under Article III, to exercise their own independent judgment?[2]

Second, even where agencies have congressional authority to interpret, how can this justify judges in deferring to the interpretation of one of the parties? When judges defer to administrative interpretation, they are deferring to the government or at least one of its agencies. And because judges defer in their cases, they often are adopting the interpretation or legal position of one of the parties. Such deference thus is systematic judicial bias in favor of the most powerful of parties and against other parties. Of course, the bias arises from institutional precedent rather than individual prejudice, but this makes the bias especially systematic and the Fifth Amendment due process problem especially serious.[3] Therefore, regardless of any statutory authority for agency interpretation, there remains the question of whether the judicial deference amounts to unconstitutional bias.

Both of these questions have been neglected. Although the question about independent judgment has long been simmering in the academic and judicial literature, commentators have not framed it in terms of judicial office and duty and thus have not recognized its full strength. Instead, with few exceptions, they either have rejected the need for independent judgment or have excused departures from it.[4]

Incidentally, the question of statutory *authority* for agencies can be put in terms of statutory *delegation* to agencies. The term "delegation," however, is too narrow, for agency interpretation involves not only legislative power, but also judicial power, and Congress does not have judicial power. In other words, although it makes sense to inquire about Congress's delegation of legislative power to agencies, Congress's delegation of judicial power is a more complicated question. Therefore, rather than talk about congressional *delegation* as the foundation for agency interpretation, this Article typically speaks about congressional *authorization*.

2 U.S. CONST. art. III.

3 U.S. CONST. amend. V.

4 The most systematic argument for independent judgment appears in Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 467, 528 (1989) (questioning the courts' abandonment of independent judgment). Other scholarship more generally notes the *Marbury* problem. *See, e.g.*, Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 569–71, 593 (1985) (rejecting the independent review model for agency interpretation); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 994–95 (1992) (observing the advantages of the mul-

The question about systematic bias, moreover, has not even been explored in academic and judicial debates; it is both unasked and unanswered.[5]

Since this Article initially appeared on SSRN, the Supreme Court has revealed some hesitation about *Chevron*.[6] In the spring of 2015, the Court in one case upheld an Internal Revenue Service ("IRS")

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tifactor pre-*Chevron* approach); Jonathan T. Molot, *Reexamining* Marbury *in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1243–44 (2002) (defending *Chevron*); Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2589, 2610 (2006) (arguing that although *Chevron* is "counter-*Marbury*," it should not apply when serious constitutional questions are at stake). For attempts to excuse judges from exercising independent judgment in cases involving agency interpretations, see *infra* Part III. For judicial attention to the problem by Justices Thomas and Scalia, see *infra* note 15.

For an argument about the duty of federal judges to decide the whole question before them based on their own independent judgment, see James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking That Article III and the Supremacy Clause Demand of the Federal Courts*, 98 COLUM. L. REV. 696, 864–73 (1998) (arguing against the constitutionality of federal court deference to state decisions under the Antiterrorism and Effective Death Penalty Act ("AEDPA")). Although the article focuses on the power of Congress to require federal judges to defer to state court judgments, its argument and analysis of case law support the argument here. *See id.*

Interestingly, some state courts, such as those of Delaware and Michigan, reject the *Chevron* deference standard in their review of state administrative interpretations. John M. Dempsey, *Administrative Law: Michigan Sides with* Marbury*, Not* Chevron*, on Agency Deference*, 55 WAYNE L. REV. 3, 4–8 (2009) (discussing Michigan); Aaron Saiger, Chevron *and Deference in State Administrative Law*, 83 FORDHAM L. REV. 555, 558 (2014) (discussing Delaware and Michigan). More general, see Saiger, *supra*, at 556–57 ("*Chevron* . . . has not been embraced with enthusiasm or consistency in state administrative law.").

5 The scholarly concern about bias has not touched on the systematic judicial bias that *Chevron* requires in favor of agencies. Instead, on one hand, there is a fear of agency bias. Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from* Chevron *and* Mistretta, 57 U. CHI. L. REV. 481, 481–84 (1990) (questioning judicial suspicions of political bias in agency decisionmaking); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2101, 2115 (1990) (discussing risks of agency bias). On the other hand, there is a fear of the individual judges' political bias in applying *Chevron*. Sunstein, *supra* note 4, at 2610 (When courts "reassert their primacy in the interpretation of statutory law . . . the political convictions of federal judges continue to play a role in judicial review of agency interpretations. These efforts should be firmly resisted."); *see* Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676, 699–701 (2007) (proposing to convert *Chevron* into a voting rule that would limit the political bias of the judges in applying *Chevron*); *see also* Stuart Minor Benjamin & Arti K. Rai, *Who's Afraid of the APA? What the Patent System Can Learn from Administrative Law*, 95 GEO. L.J. 269, 311 (2007) (discussing political bias in both agencies and judges). All such scholarship is very sensitive to the danger of bias without recognizing the most obvious danger: that *Chevron* itself establishes systematic judicial bias favoring the government over other Americans.

6 This Article first appeared on SSRN on August 7, 2014, under the title *Against Deference: Neglected Questions About the Role of Judges*. Philip Hamburger, Chevron *Bias* (Columbia Law Sch. Pub. Law & Legal Theory Research Paper Series, Paper No. 14-417, Aug. 7, 2014), http://ssrn.com/abstract=2477641.

interpretation without relying on *Chevron*, and in another case relied on *Chevron* only to reject an EPA interpretation.[7] In the spring of 2016, however, the Court relied on *Chevron*, although to support a rule made with express statutory authorization by the Patent and Trademark Office.[8] What these cases bode for the future is difficult to discern.[9] Speaking in one of them about the underlying problem, Justice Thomas questions "the constitutionality of our broader practice of deferring to agency interpretations of federal statutes."[10] Although "'[t]he judicial power . . . requires a court to exercise its independent judgment in interpreting and expounding upon the laws,' . . . *Chevron* deference precludes judges from exercising that judgment."[11] These observations move toward a candid recognition of at least one of *Chevron*'s dangers for judges.

Conceptually, the problem with most discussion of *Chevron* has been an almost exclusive focus on relations among the branches of government—that is, on relations between Congress and the Executive, between the Executive and the courts, and (completing the circle) between the courts and Congress.[12] The inquiry about these interdepartmental relations is interesting, but it has distracted attention from the more immediate questions about the judges' role—about their office and about their relation to the parties in their cases.

The goal of this Article is therefore to put these neglected questions to the judges. Rather than ask whether administrative agencies have congressional authority to interpret, judges (including lower court judges) should be asking these two questions about their own role. Perhaps some agencies have congressional authority to interpret statutes for administrative purposes; but how can this excuse judges from their constitutional duty to interpret statutes for judicial purposes, and how can it justify them in systematic bias in violation of the Fifth Amendment right to the due process of law?

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7 King v. Burwell, 135 S. Ct. 2480, 2488–96 (2015) (upholding IRS interpretation); Michigan v. EPA, 135 S. Ct. 2699, 2706–12 (2015) (rejecting EPA interpretation).

8 Cuozzo Speed Technologies v. Lee, 136 S. Ct. 2131, 2136 (2016) (upholding PTO rule).

9 *Cf.* Michael Herz, Chevron Is Dead; Long Live Chevron, 115 Colum. L. Rev. 1867 (2015) ("*Chevron* is not a revolutionary shift of authority from the judiciary to the executive. That Chevron is dead.")

10 *Michigan*, 135 S. Ct. at 2712 (Thomas, J., concurring).

11 *Id.* (quoting Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring)).

12 *See generally* Linda D. Jellum, *The Impact of the Rise and Fall of* Chevron *on the Executive's Power to Make and Interpret Law*, 44 Loy. U. Chi. L.J. 141 (2012); Joseph Landau, Chevron *Meets* Youngstown*: National Security and the Administrative State*, 92 B.U. L. Rev. 1917 (2012); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 Geo. L.J. 833 (2001).

At stake is much more than administrative interpretation. Far more important, for the judges and the nation, is the preservation of an independent judiciary and the avoidance of systematic judicial bias. Thus, when a judge "respects," "defers," or otherwise relies on an agency's judgment about the law—all of which are summarized here as "deference"—he needs to worry not about the agency's authority, but more centrally about whether she candidly is abandoning her very office as a judge and denying the due process of law.

The Neglected Questions.—The judges' failure, on the whole, to ask the relevant questions is illustrated by almost all cases on administrative interpretation of authorizing statutes. Already before *Chevron*, and especially since that case, judges have narrowly focused on the statutory question about congressional authorization, not on the constitutional questions about their own role.[13]

In the decades prior to *Chevron*, courts would examine an agency's authorizing statute to determine the degree of deference they should show to its interpretations, thus engaging in a statute-by-statute multifactor evaluation of the congressional authority for administrative interpretation.[14] Since *Chevron*, courts have deferred more systematically, for they have presumed congressional authority where authorizing statutes are ambiguous.[15] Where *Chevron* applies, judges

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13 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984). For pre-*Chevron* deference, see Merrill, *supra* note 4, at 972–75; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512–13. For origins of the *Chevron* standard in the standard for writs of mandamus, see PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 308–09 (2014).

14 Merrill, *supra* note 4, at 972–77 (noting the pre-*Chevron* multiple factors and sliding scale of deference); Scalia, *supra* note 13, at 516–17 (noting the pre-*Chevron* statute-by-statute analysis).

15 As a result of *Chevron*'s presumption from ambiguity, the courts have ended up in the peculiar position of basing their deference on statutory authorization while presuming such authorization from what the statutes do not say. *See Chevron*, 467 U.S. at 842–45. At the very least, the generality of the presumption across agencies actually leads to results that do not follow congressional intent. As put by Justice Scalia, *Chevron* replaced "statute-by-statute evaluation . . . with an across-the-board presumption that, in the case of ambiguity, agency discretion is meant," and in this way, the *Chevron* rule is "not a 100% accurate estimation of modern congressional intent." Scalia, *supra* note 13, at 516–17. Indeed, "any rule adopted in this field represents merely a fictional, presumed intent." *Id.* at 517. More recently, Justice Thomas has observed that "if we give the 'force of law' to agency pronouncements on matters of private conduct as to which 'Congress did not actually have an intent,' . . . we permit a body other than Congress to perform a function that requires an exercise of the legislative power." *Michigan*, 135 S. Ct. at 2713 (Thomas, J., concurring) (internal citation omitted).

Making matters worse, as Thomas Merrill observes, "Congress has never enacted a statute that contains a general delegation of interpretative authority to agencies." Merrill, *supra* note 4, at 995. In fact, "the one general statute on point, the Administrative Procedure Act, directs reviewing courts to 'decide *all* relevant questions of law.'" *Id.* (quoting 5 U.S.C. § 706 (2012)).

ask whether the statute is ambiguous and then whether the agency's interpretation is permissible within the scope of the statutory ambiguity; and where they answer affirmatively, they generally defer.[16] In concentrating on these questions about statutory authorization, however, judges have failed to confront the constitutional questions about their own function—about their abandonment of independent judgment and their embrace of systematic bias.

Of course, this is not to say that judges traditionally have been entirely unaware of these constitutional questions. As already noted, at least the independent judgment problem is familiar from academic debates.[17] Recognizing part of what is at stake, Justice Breyer has acknowledged the possibility that *Chevron*'s language suggests an "abdication of judicial responsibility to interpret the law," and Justice Scalia similarly worried that *Chevron* may require "a striking abdication of judicial responsibility."[18]

"If anything, this suggests that Congress contemplated courts would always apply independent judgment on questions of law . . . ." *Id.*

16 *See Chevron*, 467 U.S. at 842–45. Of course, in addition to *Chevron*'s two questions, judges must also ask other statutory questions. They must inquire whether an agency's interpretation runs afoul of the "major questions" doctrine. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) (denying *Chevron* deference for major questions that Congress would not have relegated to an agency). And they must ask any independent questions, such as whether the interpretation complies with the Administrative Procedure Act's arbitrary and capricious standard. 5 U.S.C. § 706 (2012).

17 *See supra* note 4.

18 Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 381 (1986); Scalia, *supra* note 13, at 514.

Justice Breyer aptly observes the "anomaly"—that "[t]he law 1) requires courts to defer to agency judgments about *matters of law*, but 2) it also suggests that courts conduct independent, 'in-depth' reviews of agency judgments about *matters of policy*." Breyer, *supra*, at 397. As summarized by Judge Easterbrook, Breyer believes that *Chevron* "sometimes has led courts to give more force to an agency's legal arguments (the 'persuasion' category) than to the agency's choices about wise policy (the 'respect' category), reversing the proper role of the political and judicial branches." Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1, 5 (2004).

Breyer notes the hope of some that "any citizen affected by agency action should be entitled to a court's *independent* determination that the law authorizes the agency's conduct." Breyer, *supra*, at 381. He considers this, however, "neither desirable nor practical."

> Why should courts ignore agency views on questions of law, especially when they involve minor, technical matters occurring within a complex statutory scheme, such as whether to apply an "earned income disregard" to non-needy caretaker parents under the Social Security Act? If Congress instructs the courts to pay particular attention to the agency's views, the courts should obey. And, this fact is sufficient to destroy the plausibility of *totally* independent judicial review.

Id. at 382 (internal citations omitted).

Incidentally, these justifications for deference are puzzling. Much agency interpretation goes far beyond "minor" or "technical matters," and in other areas of law, whether civil or

Nonetheless, the closest judges have previously come to addressing any constitutional problem with deference has been to worry about delegation. The Constitution delegates the lawmaking power to Congress, and, on this basis, it has been argued that Congress cannot subdelegate lawmaking to agencies—not even in the form of interpretation.[19] But judges on the whole have not worried much about the delegation objection. On the one hand, in the context of expressly authorized rulemaking, they deny that Congress delegates lawmaking power where it provides at least an "intelligible principle" to guide an agency (a conclusion that seems little more than a fiction); on the other hand, in the context of interpretation authorized by ambiguity, judges rely on congressional delegation as a justification.[20] The constitutional question about interpretation as delegation thus is asked and answered in a confusing and perfunctory manner, and judges generally concentrate on the statutory question about authorization.

Their failure to move beyond the question of what Congress has authorized became most clearly apparent when, in *City of Arlington v. FCC*, the Supreme Court held that judges should defer not only to an agency's interpretation of its authorizing statute, but also to its interpretation that it has statutory authority to interpret its authorizing statute.[21] Chief Justice Roberts led the dissenters in repudiating such

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criminal, the courts would never give up their duties, let alone across an entire swath of government power, on the theory that it was just minor and technical. As for the suggestion that, without *Chevron* deference, the courts would have to dictate the distribution of social security benefits, this misses the mark, as Congress can lawfully authorize the executive to issue rules on benefits, thus eliminating the alleged need for deference in areas such as social security. *See* Easterbrook, *supra*, at 5–6. Most fundamentally, as argued in this Article, the question of what Congress "instructs" the courts is irrelevant, as Congress cannot order the courts to abandon their constitutional office or duty, and they cannot "obey." Breyer, *supra*, at 382.

19 *See* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (noting constitutional questions about congressional delegation of legislative power); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 346–48 (2002); Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 235–38 (2005); Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 273–74 (1993).

20 *See, e.g.*, *Whitman*, 531 U.S. at 472–74 (discussing the "intelligible principle" standard); J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409–11 (1928) (same).

21 City of Arlington v. FCC, 133 S. Ct. 1863, 1871–73 (2013). The deference in *City of Arlington* to an agency's interpretation of its statutory authority to interpret is all the more remarkable because agencies notoriously stretch their statutory authority to expand their power. Long ago, Chief Justice Marshall observed that the Supreme Court can take neither a narrow nor an expansive view of its jurisdiction, but must expound its jurisdiction without leaning one way or the other:

> The duties of this court, to exercise jurisdiction where it is conferred, and not to usurp it where it is not conferred, are of equal obligation. The [C]onstitution,

deference, but he did so merely to insist that judges had to interpret for themselves whether Congress had authorized the agency to interpret.[22] Even he accepted the conventional assumption that the question ultimately comes to rest on the statutory authority for the agency, not the constitutional role of the judges. As he put it, "[c]ourts defer to an agency's interpretation of law when and because Congress has conferred on the agency interpretative authority . . . ."[23]

True enough. But there remain other questions, which Chief Justice Roberts neglected to ask—not the statutory questions about Congress and the agencies, but the constitutional questions about the judges themselves. Although there are a range of possible constitutional questions about agency interpretation, the two questions about the judges' own role matter most centrally for judicial deference, and they have been largely disregarded:

> First, even if an agency has statutory authority to judge what the law is for its purposes, do not the judges under Article III have the constitutional office or duty to exercise their own independent judgment about what the law is for their purposes?
>
> Second, regardless of any agency's statutory authority, how can judges, under the Fifth Amendment, engage in systematic bias in favor of the government and against other parties?

These are the questions that all judges need to ask themselves. When one asks these questions about independent judgment and systematic bias, it is unclear how judges can ever defer to executive or other administrative interpretations of law.

Distinct Answers.—The statutory and constitutional questions are very different and have distinct answers. The statutory question concerns the agencies' authority to interpret; the constitutional questions concern the role of judges.

> therefore, and the law, are to be expounded, without a leaning the one way or the other, according to those general principles which usually govern in the construction of fundamental or other laws.

The Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809) (holding that a corporation with shareholders from one state is a citizen of that state for purposes of diversity jurisdiction). In contrast to the Supreme Court, however, an agency can take a strained interpretation of its authority and expect judicial deference to its interpretation. *See City of Arlington*, 133 S. Ct. at 1871.

22 *City of Arlington*, 133 S. Ct. at 1877 (Roberts, C.J., dissenting).

23 *Id.*

The statutory question in *Chevron* concerns a particular type of interpretation. The most basic power of agencies to interpret is very modest and does not require congressional authorization.[24] With or without such authorization, agencies must interpret to figure out how to act without violating the law. For example, since the earliest days of the Republic, the secretary of a department, even without congressional authorization, could interpret the law for purposes of directing his subordinates in the conduct of their lawful duties.[25] In addition, however, during roughly the past century, a more ambitious sort of interpretation has developed, which gets judicial deference, and by which agencies bind Americans (in the sense of imposing legal obligation on them).[26] This sort of interpretation is understood to require congressional authorization, albeit through statutory ambiguity—the ambiguity, as explained by *Chevron*, being understood as an implicit invitation to the relevant agency to make binding interpretations.[27] There thus is an interesting statutory question about when Congress authorizes this binding agency interpretation, but in this Article the statutory question must be left for another day.

What matters here, instead, are two constitutional questions about the judges' duty of independent judgment and about the people's due process right not to be subject to systematic judicial bias. These constitutional questions cannot be resolved by asking about the statutory authority of the executive and other agencies. Even if an agency has statutory authority to interpret for its purposes, judges enjoy their office of judgment from Article III and are limited by the Fifth Amendment.[28]

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24 *See* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 89–95 (2014).

25 *See id.*

26 This understanding that agencies get *Chevron* deference for their interpretations that bind Americans is evident in the doctrine that agencies can get *Chevron* deference if they have general statutory authorization to issue binding rules. United States v. Mead Corp., 533 U.S. 218, 226–27 (holding *Chevron* deference appropriate "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority).

27 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984).

28 A possible counterargument is that Congress can subdelegate the judicial power (including interpretation or judgment about the law) to agencies. Certainly, it often is said that Congress delegates judicial power to agencies, but this cannot be delegation, for the Constitution places the judicial power in the courts, and Congress cannot subdelegate a power it does not have. U.S. CONST. art. III, § 1. The counterargument thus must be reformulated in terms of the alleged power of Congress, under the Necessary and Proper Clause, to *reallocate* the judicial power (including interpretation) to executive and other agencies. *See* U.S. CONST. art. I, § 8, cl. 18. As noted elsewhere, however, this clause is carefully drafted in terms of vested powers, and

It therefore makes no difference whether Congress authorizes agencies to interpret. Regardless, whenever judges in their cases decide questions about statutory interpretation (or otherwise about what the law is), they have a constitutional duty to exercise their own independent judgment, and the people have a constitutional right against systematic bias. Whatever the statutory authorization for agencies, the constitutional problems for the judges remain.

In other words, no amount of statutory authority for agencies can ever relieve judges of their constitutional duty or of the people's constitutional right. The statutory question about the authority of agencies cannot save judges from the constitutional questions about their role.

Overview.—Judges have for too long understood *Chevron* deference merely in terms of the statutory question about an agency's authority. More seriously, judges need to consider the neglected constitutional questions about their own role. To help judges in facing these questions, this Article touches on six basic points: (I) the limited scope of the argument, (II) the constitutional questions about the duty of independent judgment and about the right to be free from systematic bias, (III) the excuses, (IV) the depth of the constitutional problem, (V) the ways in which the argument here is not a challenge to precedent, (VI) how judges can interpret statues in the absence of *Chevron* without engaging in policy making, and (VII) the paths for judicial correction. There is much more that could be said about agency interpretation. The ensuing points, however, should suffice to show the force of the questions about independent judgment and systematic bias.

I. LIMITED SCOPE OF THE ARGUMENT

The argument here reconsiders only *Chevron* deference, and it does so merely on the basis of the judges' role. The argument, therefore, is, in various ways, very limited.

A. Other Objections to Chevron

In concentrating on the role of judges, this Article leaves aside a host of other constitutional objections to *Chevron*. These other objections are significant, but they are not the focus of this Article because

it thereby precludes Congress from authorizing any such restructuring of powers. *See* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 427–29 (2014).

they mostly concern the binding interpretation done by agencies, not the deference offered by judges.

An initial problem is usurped power. The Constitution gives Congress legislative powers, including the authority to make binding rules (that is, legally obligatory rules); moreover, it gives the courts judicial power, including the authority to decide cases and controversies.[29] The Constitution thereby conveys to the judges the authority, in cases, to make authoritative and, in this sense, binding interpretations of law.[30] Thus, to the extent executive interpretations are a form of binding lawmaking, they usurp the power of Congress, and to the extent they are a form of authoritative or otherwise binding interpretation, they usurp the power of the courts.

Second, and more broadly, the executive interpretation that qualifies for *Chevron* deference binds Americans in an irregular or extralegal manner. The Constitution authorizes the government to bind Americans (that is, impose legal obligation on them) only through the law, whether through acts of Congress or the courts.[31] In contrast, under *Chevron*, the executive uses its interpretation to bind Americans through a mechanism other than law, and in this sense, it binds them extralegally.[32] Put colloquially, the Constitution authorizes the government to bind Americans along regular avenues of lawmaking and adjudication, and *Chevron*'s binding administrative interpretations are thus like off-road driving.[33]

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29 U.S. CONST. art. I, § 1; *id.* art. III, § 1.

30 PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 536–74 (2008) (tracing the development of the authority of judges in America to expound the law). Of course, all persons, including the Executive, must interpret every day in order to ensure that they do not violate the law. Just as an individual must interpret the law when driving his car, so too must the Executive interpret the law when conducting the business of the United States. In this sense, all individuals and entities, whether private and governmental, must interpret the law for their own purposes—albeit at their own risk. PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 89–95 (2014); *see also supra* text accompanying note 24. In contrast, judges must interpret the law in their cases not merely to determine the lawfulness of their own acts, but to decide the lawfulness of what was done by the parties, and this is the sort of interpretation that is legally authoritative and, in this sense, binding. HAMBURGER, LAW AND JUDICIAL DUTY, *supra*, at 543–54.

The early federal executive recognized the distinction between binding and non-binding interpretation, and it made no pretense that it could issue legally authoritative interpretations or otherwise use its interpretations to bind members of the public. PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 89–95 (2014). "Instead, what heads of departments claimed was simply the authority to interpret the law for their departments and thereby direct their subordinates . . . ." *Id.* at 89.

31 *See* U.S. CONST. art. I, § 1; *id.* art. III, § 1.

32 For interpretation as a mode of extralegal lawmaking, see PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 51–55, 113–14 (2014).

33 PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 1–2 (2014).

Third, there is a delegation problem: agency interpretation is unconstitutional to the extent it is an exercise of subdelegated legislative power. Of course, it may be protested that the Constitution does not textually bar the subdelegation of legislative power.[34] As noted elsewhere, however, the Constitution's very first substantive word is on point.[35] There consequently is much better reason than is usually understood to conclude that the subdelegation of legislative power recognized by *Chevron* is unconstitutional.

Thus, quite apart from the questions raised in this article, there are powerful arguments against *Chevron* deference.[36] Such argu-

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34 Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) (stating that the Constitution "does not in terms forbid delegations of [legislative] power").

35 The Constitution begins by stating that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States," and if all legislative powers shall be vested in Congress, none of them can be elsewhere. U.S. CONST. art. I, § 1. There would be no need for the word *all* if the grant of legislative powers were meant to be permissive, and the word thus clarifies (what already is evident from the Constitution's history and structure) that the grant is exclusive—that Congress cannot subdelegate its legislative powers. PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 386–88 (2014). Thus, executive interpretation is unconstitutional to the extent it is an exercise of legislative power. *See id.*

In contrast, observe that the Constitution does not speak of *all* judicial power. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). The Constitution could not do so, because it does not delegate the judicial power to one body, but to a Supreme Court and such inferior courts as Congress may establish. *Id.* But this does not mean that Congress can delegate judicial power to the executive. For one thing, Congress cannot subdelegate a power it does not have. For another, judges, on account of the nature of their office as judges, cannot delegate their judgment, including their interpretation or judgment about the law.

36 The enumeration of such arguments in the text is by no means complete. An additional argument arises from the rule of lenity. *See* United States v. Whitman, 555 F. App'x 98 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 352, 354 (2014) (describing one of the functions of the rule of lenity as "vindicat[ing] the principle that only the *legislature* may define crimes and fix punishments. Congress cannot, through ambiguity, effectively leave that function to the courts—much less to the administrative bureaucracy"); *see infra* note 81.

Another argument is that deference to executive interpretation appears to treat such interpretation as supralegal. When James I demanded judicial deference to prerogative interpretation of statutes (what now is called deference to administrative interpretation), his arguments ultimately came to rest on supralegal power. PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 51–53, 290 (2014). Judges, however, generally resisted deference to prerogative interpretation, explaining that their office was one of independent judgment. *Id.* at 54, 289 (regarding Coke); *id.* at 290–91 (regarding judges in general). Of course, the contemporary version of the deference is no longer justified directly in terms of a power above the law. Nonetheless, Americans have for more than a century justified administrative power as necessary—indeed, as a necessity that rises above the forms of the Constitution—and, in this way, they have perpetuated the old claims for a power above the law. *Id.* at 16–19, 419–23, 470–71 (regarding such arguments and their path from the prerogative era to the progressive era). It therefore must be asked whether *Chevron* deference revives pre-constitutional ideas of supralegal power.

ments, however, are explored elsewhere, and they mostly show that the executive cannot constitutionally issue legally binding interpretations.[37] In contrast, this Article concentrates on the other half of the equation—on the role of judges—and asks a pair of neglected questions that should be particularly troubling for the judges. Quite apart from whether or not, under the Constitution, the executive may adopt interpretations, judges cannot constitutionally defer to such interpretations, lest the judges abandon their office of independent judgment and engage in systematic bias.

B. Limited Reach

This Article focuses on the conflict between *Chevron* deference and the role of judges, and this focus limits the argument's reach. For one thing, the argument bears on administrative rules only to the extent they depend on *Chevron* deference. Some rules offer interpretations of statutory ambiguities, and when such rules come into court, they depend on judicial deference—most prominently, *Chevron* deference. In contrast, other rules are expressly authorized and thus do not depend on *Chevron* deference. Much rulemaking is thus beyond the scope of this Article. Accordingly, nothing here questions the ability of judges to uphold an agency rule, unless they uphold it out of *Chevron* deference to the rule's interpretation of a statute.

The focus here on the role of judges also limits the argument to matters within the cognizance of the courts. The argument has implications for all agency interpretations of statutory provisions that are binding (in the sense that such provisions come with legal obligation), for these are the provisions that ordinarily are adjudicated by the courts. It typically, however, will not have implications for agency interpretations of statutory provisions authorizing benefits, for most benefits are not legally enforceable rights and therefore are not ordinarily adjudicated by the courts. Even when this sort of benefit comes into court, judges should refrain from second-guessing any agency in-

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37 PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 3, 51, 113–14 (2014). One might add that *Chevron* undermines one of the key legitimizing assumptions of administrative power. This sort of power, including the lawmaking power exercised by agencies, is widely considered tolerable because of the opportunity for judicial review. *See* JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 37 (1927); Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 269 (1990); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 975–76 (2011). *Chevron* deference, however, profoundly undercuts the judicial review of administrative interpretations and, thus, of much administrative lawmaking.

terpretation of the underlying statutory provision—not because they must defer to it, but because they must defer to the law, and where judges decide that the underlying statute leaves decisions about a benefit to the executive, there usually is no further legal question for the courts to resolve.[38] For example, where a statute creates a legal right to a benefit, but not to any particular method of calculating it, judges must interpret the statutory right for themselves while recognizing that decisions about the method of calculation belong to the executive.[39]

The argument, moreover, does not preclude judges from giving consideration to the executive's interpretation of a statute. On the contrary, where the government is a party, judges *must* consider the government's legal arguments about interpretation.[40] Judges, however, cannot give agency interpretations greater consideration or respect than other interpretations, for this would be to abandon their duty of independent judgment, and where the government is a party, it would be to favor the government in violation of the due process of law.

C. Related Questions

In concentrating on *Chevron* deference, this Article must leave aside some nearby problems. At the same time, it is important to recognize the implications for them.

Most immediately, the challenge here to *Chevron* deference also reaches *Mead-Skidmore* "respect." *Chevron* "deference" prototypically applies to agency interpretations that go through the notice-and-comment process.[41] Agencies, however, also interpret statutes without complying with this process, and in such instances (according to *United States v. Mead Corp.* and *Skidmore v. Swift & Co.*), agency interpretations get a less automatic deference, which the Supreme

38 *See* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 292–94 (2014) ("[E]ven when the judges acknowledged public rights or spheres of executive authority, it was a stretch to say that they were deferring to the executive. Instead, they were following the law.").

39 *See, e.g.*, Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 511 (1981) (concluding that benefits under ERISA are legally enforceable, but that there is no guarantee of a particular amount or method for calculating the benefit). Of course, a court could examine constitutional claims about the benefits—for example, under the Establishment Clause—but that is another question.

40 *See also* Easterbrook, *supra* note 18, at 5 (regarding deference to "persuasion").

41 *See* Christensen v. Harris Cty., 529 U.S. 576, 587 (2000); Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). Other decisions to which *Chevron* deference applies include interpretations pursuant to formal adjudication. *See* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 116 (John F. Duffy & Michael Herz eds., 2005).

Court calls "respect."[42] But regardless of whether judges engage in relatively automatic "deference" or less automatic "respect," they are relying, to some degree, on the judgment of administrators in place of their own independent judgment.[43] Thus, although *Mead-Skidmore* "respect" is not formally called "deference," it is another type of deference to agency interpretation.[44] The danger to independent judgment arises whenever judges relinquish their judgment in any degree, and the danger of systematic bias arises whenever judges show greater respect for the legal position of one party than that of the other. The arguments here against *Chevron* deference therefore also apply to *Mead-Skidmore* respect.

For similar reasons, this Article's argument also reaches *Auer* "deference." In *Auer v. Robbins*, the Supreme Court held that judges should defer to an agency's interpretations of its rules—that such an interpretation is "controlling unless 'plainly erroneous or inconsistent with the regulation'"—and this deference is even stronger than that enunciated in *Chevron*.[45] Although administrative rules are not laws,

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42 United States v. Mead Corp., 533 U.S. 218, 221 (2001); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); *see Christensen*, 529 U.S. at 587. Professor Peter Strauss speaks of "*Chevron* obedience" and "*Skidmore* weight." PETER L. STRAUSS, ADMINISTRATIVE JUSTICE IN THE UNITED STATES 371–72 (2d ed. 2002). Professor Thomas Merrill notes that *Chevron* sets "a standard of maximum deference." Merrill, *supra* note 4, at 977.

43 As put by Henry Monaghan, "[d]eference, to be meaningful, imports agency displacement of what might have been the judicial view *res nova*—in short, administrative displacement of judicial judgment." Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 5 (1983).

Judge Easterbrook aptly cautions that the word "deference" can mean different things. In his analysis, it can mean any of three things: (a) deference to delegated rulemaking power, (b) respect for the political or policy discretion of the executive branch as established by an act of Congress, and (c) the persuasiveness of the agency's understanding of the law. Easterbrook, *supra* note 18, at 4–5. The argument here, however, is not confined to Easterbrook's category (a). Although he explains his category (b)—what he calls "respect" for another branch's political discretion—as part of the President's constitutional power to execute the laws, it requires judges to rely on the judgment of administrators in place of their own independent judgment. Of course, Congress can authorize a wide range of discretionary power in the executive—for example, in the distribution of benefits—but it cannot excuse judges from their duty to exercise their own independent judgment about what the law is. Similarly, Easterbrook's category (c)—what he calls "persuasion"—apparently includes not merely persuasiveness, but a relinquishment of judgment about what a statute requires, for "[t]o the extent that other factors (collectively 'legislative intent') matter, the agency may have better access to indicators of this intent than do judges." *Id.* at 5. Thus, all of Easterbrook's first category and aspects of the other categories are included in what this Article calls "deference."

44 In accord, see William N. Eskridge, Jr., Interpreting Law: A Primer on How to Read Statutes and the Constitution 296, 417 (Foundation Press 2016) (discussing "*Skidmore* deference" as a "Deference Canon" and "deferprudence").

45 Auer v. Robbins, 519 U.S. 452, 461 (1997) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)).

many of them give effect to binding statutes, and are themselves considered binding under section 553 of the Administrative Procedure Act, and in reality have the binding effect of laws.[46] Accordingly, when judges defer to agency interpretations of such rules, they surely must meet the same constitutional standards of judgment and due process as in their judgments about statutes.

Further from this Article's inquiry, but close enough to be affected, is the question of whether judges should defer to agency administrative records and other decisions of fact. This goes beyond the questions here about interpretation, but deference to administrative interpretation is not the only problematic sort of judicial deference. Just as parties are owed the independent judgment of judges, they also are owed the independent verdict of a jury; thus, when judges defer to administrative records or other agency decisions about facts, they are denying Americans their right to a jury.[47] Judges are denying Americans the right to a jury not merely at the agency level, but also in the courts themselves. Moreover, when judges adopt the record or factual claims of one of the parties, in place of a judicial record, they are engaging in systematic bias in favor of one party's version of the facts. This behavior is difficult to reconcile with the due process of law. The questions about deference to agency interpretation thus point to similar questions about deference to administrative records and other agency decisions about facts.

Another related problem, that of agency "determinations," combines elements of interpretation and factfinding. Many federal statutes give agencies the authority to make determinations about the application of law in particular instances. For example, in *NLRB v. Hearst*, the NLRB held hearings regarding four newspapers, and made a determination under the National Labor Relations Act that the regular full time newsboys selling each paper were "employees" under the statute.[48] This sort of determination simultaneously interprets the statute and applies it to particular persons. Deference to such a determination thus includes both deference to agency interpretation and deference to agency fact-finding, but this does not mean it escapes the objections to either sort of deference. On the contrary, both objections apply. To the extent such a determination is an interpretation of law, any deference to it is an abandonment of the judges' duty of inde-

46 Administrative Procedure Act, 5 U.S.C. § 553 (2012).

47 *See* U.S. CONST. amend. VII.

48 NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 114 (1944) (applying National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151–169 (2012))).

pendent judgment and is a form of systematic bias about the law. To the extent such a determination is a decision about the facts, any deference to it is a denial of the right to a jury and a form of systematic bias about the facts. Either way, judges cannot defer.[49]

In repudiating *Chevron* deference, this Article concentrates on the prototypical instance of deference to executive agencies, and this Article therefore casually speaks about *executive* interpretation, *administrative* interpretation, and *agency* interpretation, adopting whichever locution seems convenient for purposes of writing in a concrete manner. The arguments here, however, reach more than the deference to executive agency interpretation; they also cut against any deference to interpretation by the President and against any deference to interpretation by independent agencies. It, therefore, is important to emphasize that when this Article speaks about agency interpretation, this is not to say the Article is without implications for presidential interpretation, and that when it speaks about executive interpretation, this is not to say it is without implications for independent agency interpretation. Even when speaking in narrow terms, this Article rejects judicial deference to all such interpretation.

Last but not least, there is the problem of what judges would do if they did not engage in *Chevron* deference. It is widely assumed that, without *Chevron*, judges inevitably would drift off into policymaking and intractable disputes about the meaning of open-ended statutes.[50] From this perspective, *Chevron* is necessary. Any argument against *Chevron* deference therefore must consider whether judges could interpret profoundly ambiguous authorizing statutes without engaging in policymaking. Certainly, judges would have to confront this question if they were to follow the constitutional path proposed here. Part

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49 At the same time, note that where Congress authorized the President to make a general determination about the fact of war, peace, or unequal tariffs, courts traditionally accepted the President's determination in these matters of foreign affairs. PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 107–10 (2014). Tellingly, however, these determinations were not about domestic matters and usually concerned acts of state.

A clearer exception from the argument in the text can be found in tax assessments. The Constitution attempted to avoid the dangers evident in the English excise system, and Congress therefore initially avoided authorizing tax assessments. *Id.* at 208–10. Nonetheless, assessment determinations soon became part of the federal tax system, and at least in the tax system, such determinations came to enjoy something similar to judicial deference. *Id.* This sort of exception, however, cannot be considered evidence of the rule.

50 *See, e.g.*, Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. AM. U. 187, 194–96 (1992).

VI of this Article accordingly considers what judges could do in the absence of *Chevron*.[51]

In the meantime, it is enough to observe the confined scope of the argument. It omits other objections to *Chevron* deference, it reaches only such deference and its conflict with the judges' role, and it does not address a host of related deference questions, although it certainly has implications for them.

II. INDEPENDENT JUDGMENT AND SYSTEMATIC BIAS

Judges have an office of independent judgment, and all who come before them have a right to the due process of law. Nonetheless, judges defer to the judgment of executive and other agencies, and this leads judges far astray.

A. Abandonment of Independent Judgment

The initial problem concerns the office or duty of a judge to exercise his own independent judgment. When a judge defers to an agency's interpretation of a statute, he defers to its judgment about what the law is, and he thereby violates his office or duty to exercise his own independent judgment.

Independent judgment tends to be understood loosely as a constitutional value, not as the very office of a judge.[52] Therefore, although *Chevron*'s departure from independent judgment is familiar, the dan-

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51 Of course, there are many other related, but distinct questions that are not directly resolved here. For example, this Article does not explain how judges should take account of special technical expertise (whether it comes from an agency or from another party to a proceeding), except by concluding that judges cannot defer to agency interpretations and by suggesting that judges cannot defer to agency determinations, agency records, or other agency fact-finding.

In addition, there are some less related inquiries, such as those concerning how often courts actually defer under *Chevron* to agency interpretations. Some scholars have looked at the statistical outcome of cases decided under *Chevron*, and on this basis have questioned whether the judges are really very deferential. Such an approach, however, is not very informative for this Article's inquiry. First, the inquiry raised here concerns the judge's standard of deference rather than the outcome of cases. The judicial office of independent judgment and the right of due process dictate how judges should decide cases, not the outcome of their cases. Second, the statistical approach draws on cases that are litigated to a conclusion in the circuit courts, and this sample is much narrower than the total of instances in which judges adopt the *Chevron* standard—let alone the total of instances in which Americans are affected by this standard.

Who ordinarily would litigate against a biased judge? Most parties affected by *Chevron* surely do not pursue their claims because they have little hope of an unbiased decision, and they thereby are chilled in their assertion of their legal rights. Indeed, any sample drawn from federal cases is apt to be skewed toward including cases in which judges should not defer; otherwise the parties arguing against deference would not have litigated the cases so persistently.

52 *See, e.g.*, Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985).

ger does not seem particularly severe. Independent judgment, however, is more than a constitutional value; it is the most fundamental element of the office of a judge as established by Article III. Thus, when judges acquiesce in *Chevron* deference, they unconstitutionally abandon their very office as judges.[53] And because their office or duty is a measure of the judicial power that the Constitution vests in the courts, judges not only abandon their office as judges but also exceed the constitutional power of the courts.

1. *The Office of Independent Judgment*

Judges are individuals who hold the office of a judge under the Constitution. Although this may initially seem almost a tautology, it is revealing because the central duty associated with the office of a judge has long been to exercise independent judgment.[54]

An office traditionally was understood to be a specialized duty.[55] Thus, just as a dog catcher had the office or duty of catching dogs, a judge had the office or duty of exercising judgment. The duty of judgment, however, was different from things like dog catching, not least because judging was not understood to be a physical act. On the contrary, from the Middle Ages onward, judgment was thought to be a faculty of the soul—or as it would be put nowadays, of the mind—and it was distinguished from another such faculty, that of will.[56] It thus came to be widely assumed that judgment had to be independent of will.[57] Against this background, English and then American lawyers came to recognize that the central duty of a judge was to exercise independent judgment in accord with the law of the land.[58]

This history has been recounted elsewhere, and it matters here simply because it shows that judges have long been understood to hold a distinctive sort of office—an office of judgment, in which they must exercise their own independent judgment.[59] All sorts of government officers and other Americans must exercise judgment about a variety of things, including the law, but only judges have the office of exercising judgment in cases, including judgment about what the law

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53 U.S. CONST. art. III.

54 PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 148–78, 316–26 (2008).

55 *Id.* at 104–06, 316–26.

56 *Id.* at 148–49; *cf.* THE FEDERALIST NO. 78 (Alexander Hamilton), *reprinted in* THE FEDERALIST 521, 523 (Jacob E. Cooke ed., 1961) ("The judiciary . . . may truly be said to have neither Force nor Will, but merely judgment . . . .").

57 PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 104–06, 148–78, 316, 507–35 (2008).

58 *Id.* at 148–78, 507–35.

59 *Id.*

is, and only judges are bound by the nature of their office to exercise their own independent judgment.[60] The duty of independent judgment, in short, was part of judicial office and, thus, came with it.

To be sure, American constitutions did not spell this out, but that was because it was nearly definitional.[61] Judicial office, and its duty of independent judgment, was the very nature of what it meant to be a judge or to exercise judicial power, and it thus could be taken for granted whenever a constitution mentioned judges, judicial power, or courts.[62] When a constitution authorized judges—as when Article III of the U.S. Constitution authorized courts with judges—it thereby imposed judicial office or duty on them.

A constitution also imposed this duty when it placed judicial power in courts. When James Iredell in 1786 explained the duty of judges under the "judicial power" of the North Carolina Constitution, he spoke of "[t]he duty of that power"—meaning the duty that came with the judicial power of North Carolina.[63] Similarly, this duty came with the judicial power of the United States. In other words, the grant of the power conveyed the duty, and independent judgment was thus the duty of those to whom the Constitution gave the exercise of the power it placed in the courts.[64]

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60 *Id.* at 545.

61 *Id.* at 578–79.

62 *Id.* at 583–85.

63 James Iredell, *To the Public*, N.C. GAZETTE (NEW BERN), Aug. 17, 1786, *reprinted in* 3 The Papers of James Iredell 1784-1789 227, 227–31 (Donna Kelly & Lang Baradell eds., 2003).

64 What typically led Iredell and other Supreme Court Justices to discuss their duty was their need to explain why they felt obliged to dissent. Sitting on circuit to review a district court decision, Iredell explained, "[i]t is my misfortune to dissent from the opinion entertained by the rest of the court upon the present occasion; but I am bound to decide, according to the dictates of my own judgment." Georgia v. Brailsford, 2 U.S. (2 Dall.) 415, 415 (1793) (Iredell, J., dissenting). Similarly, after Chief Justice John Marshall made a point that he thought "must be conceded by all," he added: "but whether it be conceded by others or not, it is the dictate of my own judgment, and in the performance of my duty I can know no other guide." United States v. Burr, 25 F. Cas. 2, 15 (C.C.D. Va. 1807) (No. 14,692a). Justice James Story explained:

> I could not easily persuade my mind to adopt the construction adopted by the court below. For the opinions of that court I entertain every respect, because I know they are well considered and carefully weighed: But sitting here, it is also my duty to exercise my own judgment, and to decide accordingly.

The Friendship, 9 F. Cas. 822, 825 (C.C.D. Mass. 1812) (No. 5,124).

Significantly, as Justice Story acknowledged in another case, the imperfection of his judgment could not excuse him from exercising his own judgment, for "my duty requires that whatsoever may be its imperfections, my own judgment should be pronounced to the parties." The Julia, 14 F. Cas. 27, 33 (C.C.D. Mass. 1813) (No. 7,575). Similarly, in another case, he explained:

> In entering on this discussion, I beg to be understood, as entertaining the highest respect for the opinions of the district court, and if the result of my inquiries differs from that pronounced in its decree, it ought to induce me to entertain some diffi-

Because of their duty of independent judgment, the judges had to reach their own judgments about interpretation. To protect the judges' independent judgment from external threats, the Constitution guaranteed them life tenure and undiminished salaries.[65] Their independence, however, consisted of more than just these outward, institutional protections. Judges more basically had an internal duty to exercise their own independent judgment about the law of the land, and they therefore were not to be predisposed to any party in reaching judgments about what the law is—that is, in interpreting the law. As put by Nathaniel Gorham in the 1787 Constitutional Convention, "the Judges ought to carry into the exposition of the laws no prepossessions with regard to them."[66]

This duty was what gave judicial interpretation its distinctive legal authority. In the words of the Federalist Papers, "[t]he interpretation of laws is the proper and peculiar province of the courts."[67] Of course, as already noted, other Americans, including those in the executive branch, had to interpret for their own purposes, but because judges interpreted in pursuit of their constitutional office of independent

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> dence, as to the correctness of my own judgment. I feel, however, that I have no right to withhold an opinion, which the occasion requires me to declare.

The Liverpool Packet, 15 F. Cas. 641, 642–43 (C.C.D. Mass. 1813) (No. 8,406). The next year, he also said: "I have the consolation however to know, that if in this I commit an error, it can, and it will, be corrected by the wisdom of a superior tribunal. My own judgment however must be my guide . . . ." The Bothnea, 3 F. Cas. 962, 967 (C.C.D. Mass. 1814) (No. 1,686).

Of course, judges did not always speak out when they disagreed with their colleagues. Justice Story at one point noted that he sometimes chose to remain silent in such circumstances. Even in such a case, however, he distinguished his judgment from his decision to speak out, and where the matter was important, he felt obliged not only to maintain the independence of his judgment but also to express it:

> It is matter of regret that in this conclusion I have the misfortune to differ from a majority of the Court, for whose superior learning and ability I entertain the most entire respect. But I hold it an indispensable duty not to surrender my own judgment, because a great weight of opinion is against me, a weight which no one can feel more sensibly than myself. Had this been an ordinary case I should have contented myself with silence; but believing that no more important or interesting question ever came before a prize tribunal, and that the national rights, suspended on it, are of infinite moment to the maritime world, I have thought it not unfit to pronounce my own opinion, diffident indeed of its fullness and accuracy of illustration, but entirely satisfied of the rectitude of its principles.

The Nereide, 13 U.S. (9 Cranch) 388, 455 (1815) (Story, J., dissenting).

65 U.S. CONST. art. III, § 1.

66 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 79 (Max Farrand ed., rev. ed. 1937); *cf.* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 507–12 (2008) (discussing internal duty of independent judgment).

67 THE FEDERALIST NO. 78, *supra* note 56, at 525; *cf.* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 543–48 (2008) (discussing authority of judicial interpretation).

judgment, interpretation was peculiarly their office, and their interpretation thus had the authority of their office.

Ultimately, the office or duty of a judge to exercise his independent judgment was the very identity of a judge, and it thus was the foundation for much of what distinguished the judiciary.[68] It was the justification for the judges' power to decide cases, for their security in their tenure and salaries, for their authority in expounding the law, and for even their duty to hold unconstitutional statutes unlawful and void.[69] More centrally relevant here, their office or duty under Article III required them to exercise their own independent judgment.

2. *Abandoning Independent Judgment*

Judicial office under Article III still imposes on a judge a duty to exercise his own independent judgment. He must exercise his own judgment in a case, including his own judgment about what the law is, and he therefore cannot defer to the judgment of an administrative agency without abandoning his office as a judge.

In a criminal case, the judge cannot defer to the prosecutor's interpretation of the law. In a civil case between a corporation and an individual, the judge cannot defer to the corporation's interpretation of the law. Nor can a judge defer to the interpretation put forward by an employer in an employment dispute. Any such deference would be a departure from the judge's duty of independent judgment and thus from his very office and power as a judge. Nonetheless, in administrative cases, although judges do not defer to the judgments of prosecutors, of employers, or of corporations, they regularly defer to the judgments of executive and other administrative agencies.[70]

The judges thereby abandon their very office as judges. A judge's central office or duty, and therefore his power and very identity under Article III, is to exercise his own independent judgment in cases in accord with the law. He therefore cannot defer to executive or other administrative judgments about what the law is, but can defer only to the law. Nonetheless, judges defer to executive judgments about the law—in particular, executive and other agency interpretations of statutes.[71]

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68 *See* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 148, 507 (2008).

69 For the authority of judges to expound the law, see PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 218–34, 543–54 (2008); for holding unconstitutional statutes void, see *id.* at 394–461.

70 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

71 *See id.* The duty of independent judgment is no longer viewed with as much reverence as in the past, and from this perspective, *Chevron* may not seem so serious an assault on judicial

Judges openly concede this when they speak of their "deference." The verb "defer" has been defined as "to leave to another's judgment."[72] Deference is a mode of "submission," being "a deference to the judgment" of others.[73] Deference thus is an abandonment of a judge's own independent judgment. And because this independent judgment is the very office of a judge, a judge who defers to executive or other administrative interpretation is abandoning his office as a judge.

A black gown is not enough to make a judge. To be sure, there are outward qualifications for being a judge. They include the President's nomination, the Senate's ratification, the judge's oath, and more substantively the judge's learning and temperament.[74] But none of this is enough, for the act of judging requires an inward exercise of the judge's own independent judgment in accord with the law of the land.

It therefore is no small matter for a judge consciously—as a matter of doctrine—to defer to the judgment of any executive or other agency about the law. A judge who defers to the judgment of an executive officer about the law in a case does not literally stand naked, bereft of his robes, like the emperor who had no clothes. Yet even though such a judge retains all of the outward robes of his office, he is stepping outside his interior office or duty of independent judgment. He thereby is acting in a manner incompatible with his constitutional office and power as a judge.

But this is not all; it gets worse.

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office. Independent judgment, however, remains the central feature of judicial office. Judges often rely on others, such as clerks, to suggest judicial analysis and to write opinions, but judges are understood to be the ones who ultimately must exercise judgment. Although they legitimately exercise will in the administration of their courts, they still typically understand themselves to be exercising judgment in their core function of deciding cases. To be sure, judges sometimes pursue their own will, but most continue to recognize that in deciding cases they centrally must exercise judgment. The essential and central role of the judges remains the exercise of their own independent judgment, and none of the deviations from this ideal can justify the judges in relinquishing this core duty in a core application—saying what the law is in cases.

72 *Defer*, 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 6M (London, W. Strahan 1785). Similarly, WEBSTER'S NEW COLLEGIATE DICTIONARY defines "defer" as "to submit to another's wishes, opinion, or governance usually through deference or respect." *Defer*, WEBSTER'S NEW COLLEGIATE DICTIONARY 294 (Henry Bosley Woolf et al. eds., 150th Anniversary ed. 1981).

73 *Deference*, JOHNSON, *supra* note 72 (quoting Addison).

74 U.S. CONST. art. II, § 2, cl. 2; *id.* art. VI; 28 U.S.C. §§ 44(a), 453 (2012).

B. Systematically Biased Judgment

A second problem is judicial bias. In deferring to executive interpretation, judges exercise systematically biased judgment. One of the advantages of having judges who exercise their own independent judgment is that their independent judgment cuts off much judicial bias.[75] One of the costs of deference, in contrast, is that it systematizes biased judgment in violation of the Fifth Amendment's guarantee of due process.

Of course, there is no reason to think that the bias arises from personal prejudice. On the contrary, far from being an individual problem, arising from the prejudice of individual judges, it is an institutional difficulty produced by an institutional rule about judging. But this makes the *Chevron* slant all the more remarkable and worrisome. It is an institutionally declared and thus systematic precommitment in favor of the government.

Whereas the independent judgment problem arises in all cases in which the judges apply the *Chevron* doctrine, the bias problem comes up only in those *Chevron* cases in which the government is a party—or at least the party in interest. In some *Chevron* deference cases, the parties are merely private bodies and the government usually is not involved. Often, however, the government is a party. These governmental cases include not only those in which an agency is the named party, but also those in which the head of an agency is a party, for even in these instances, the government is the party in interest.[76] All such cases in which the government is a party or party in interest provoke the question about systematic bias.[77]

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75 *See* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 507–12 (2008).

76 *See, e.g.*, Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457 (2001).

77 Even where the parties are private, there can still be questions about systematic bias. *Chevron* itself offers an interesting example. The case began as a suit against the Administrator of the EPA and thus a case involving the government. Nat. Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718, 718 (1982). After a decision against the government, however, the appeal to the Supreme Court was brought by Chevron—a private party, which had been an intervenor below—and the EPA Administrator dropped out of the case. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 841, n.4 (1984). The government thus was no longer a party, but when the Supreme Court held for Chevron, it deferred to what had been the government's interpretation in the case, even if a private party was now carrying the burden of defending that interpretation. *Id.* at 842–45.

Still more complicated are cases in which the government never participates as a party, but private parties enforce ambiguous statutes against other private parties in proceedings (for fines or damages) that serve as enforcement mechanisms. Skidmore v. Swift & Co., 323 U.S. 134 (1944). In such instances, although the government is not a party, it perhaps should be considered a party in interest. Such questions, however, need not be resolved here.

The difficulty is that *Chevron* sets forth a test under which judges "defer" to the government interpretation even when the government is a party.[78] This usually is deference to an executive interpretation, and even in the rare instance in which the agency is entirely independent, it is deference to an agent of the government—thus making it almost always deference to the government. Either way, the result is systematic deference to one of the parties and its judgments about the law—that is, a precommitment to one of the parties. Under Article III, judges have a duty to exercise independent and thus unbiased judgment, and under the Fifth Amendment's guarantee of due process, they at the very least are barred from engaging in systematic bias.[79] Nonetheless, when they defer to administrative interpretation, they systematically favor executive and other governmental interpretations over the interpretations of other parties. They thus systematically exert bias toward the government and against other parties, in violation of the Fifth Amendment.

It ordinarily would be outrageous for a judge in a case to defer to the views of one of the parties. And it ordinarily would be inconceivable for judges to do this regularly by announcing ahead of time a rule under which judges should defer to the interpretation of one of the parties in their cases, let alone the most powerful of parties, the government. Nonetheless, this is what the judges have done. It therefore is necessary to confront the reality that when judges defer to the executive's view of the law, they display systematic bias toward one of the parties.

The seriousness of the bias becomes apparent when one recalls that administrative interpretations are often the foundation for what, in their nature, are criminal prosecutions. It has long been understood that government proceedings for fines, or other penalties or correction, are criminal in nature, and that many agency proceedings, in reality, are substitutes for criminal prosecutions.[80] This is not the place to evaluate the danger of allowing the executive to evade criminal proceedings in court by bringing administrative proceedings within an

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78 *See Chevron*, 467 U.S. at 842–45. For this Article's focus on the *Chevron* standard rather than the number of times that courts end up deferring under the *Chevron* standard, see *supra* note 51.

79 *See In re* Murchison, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases.").

80 For the historical foundation of considering many administrative proceedings criminal in nature, see PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 160–61, 228–31, 246 (2014).

agency. Instead, the point is simply that when judges review what, in their nature, are criminal prosecutions, they defer to the government's interpretations of the law, systematically accepting the legal position of the prosecuting entity. When judges thereby declare their deference to administrative interpretations, they not only reveal systematic prejudice in favor of the government, but also announce their prejudice against what are really criminal defendants.[81]

The most basic point, however, applies regardless of whether an administrative proceeding is an evasion of criminal proceedings: when judges defer to executive interpretation, they no longer exercise unbiased or independent judgment. On the contrary, they predictably defer to the judgment of one of the parties. This is systematic prejudice, and it not only is an abandonment of the judicial duty of independent judgment, it also is a brazen violation of the due process of law.

C. *The Irrelevance of the Conventional Question*

In light of the constitutional questions, the more conventional statutory question—the one asked by judges in cases such as *Chevron* and *City of Arlington*—is irrelevant.[82] Even if an agency has congressional authority to interpret, how can congressional authorization of an agency's interpretation ever displace the judges' constitutional duty to exercise their own judgment about the law in their cases? Or a person's constitutional right to the due process of law? What matters for understanding deference is not the conventional question about the authority of agencies, but instead the constitutional questions about the judges' duty and bias.

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81 The bias against defendants is all the more clear from the contrast between *Chevron* deference and the rule of lenity. *See* Elliot Greenfield, *A Lenity Exception to* Chevron *Deference*, 58 BAYLOR L. REV. 1, 38–47 (2006) (discussing the conflict between the rule of lenity and *Chevron* deference in construing ambiguous statutory provisions). When criminal defendants are prosecuted in a court of law, with real judges, juries, and the full due process of law, they get the benefit of the rule of lenity, and appellate judges protect them from trial court decisions that interpret ambiguous criminal statutes against them. *See id.* at 8–14; *see also, e.g.*, United States v. Bass, 404 U.S. 336, 347 (1971) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.") (quoting Rewis v. United States, 401 U.S. 808, 812 (1971)). But when the government evades the courts by prosecuting defendants in administrative proceedings, without real judges and juries, and with only the faux process of administrative power, appellate judges follow *Chevron* deference. Rather than follow the rule of lenity, the judges go to the opposite extreme, which reveals the extent of the bias.

82 City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013) ("*Chevron* is rooted in a background presumption of congressional intent: namely, 'that Congress, when it left ambiguity in a statute' administered by an agency, 'understood that the ambiguity would be resolved, first and foremost, by the agency . . . .'") (quoting Smiley v. Citibank (S.D.), N. A., 517 U.S. 735, 740–41 (1996)); *Chevron*, 467 U.S. at 842–44.

Even if Congress could give legislative and judicial power to executive and other agencies, Congress cannot take away the power and duty of judges, under Article III, to exercise their own independent judgment in their cases; nor can it take away a person's Fifth Amendment right to the due process of law, including their right to have judges who have not precommitted themselves to the government's legal position. Although Congress can limit the jurisdiction of the courts and thereby limit judges from hearing classes of cases, it cannot bar them from considering classes of questions or arguments.[83] Thus, where it leaves judges to decide cases, it cannot relieve them of their duty to exercise their own independent judgment; nor can it authorize them to violate the due process of law.

It therefore is difficult to understand how congressional authorization of agency interpretation can ever relieve judges of their constitutional duty in their cases to exercise their own independent judgment about the law. Nor is it clear how congressional authorization of agency interpretation can ever authorize them to engage in systematic bias in violation of due process. It is one thing for Congress to authorize executive agencies to interpret for their own purposes, but it is quite another for Congress to authorize judges to abandon their independent judgment in their cases and thus their very office and power as judges, or for Congress to authorize them to violate the due process of law. The judges' duty of independent judgment, and the people's right to due process, both rest on constitutional foundations, and they therefore cannot be dislodged by mere congressional enactments.

The question about congressional authority for agencies to interpret is therefore irrelevant to the role of judges. Whatever congressional authority the agencies have to interpret for their own purposes, judges constitutionally must not defer to agency interpretations, lest they violate their constitutional duty of independent judgment and the constitutional right of the people to be free from systematic bias.

Deference to administrative interpretation has led judges further astray than they have realized. They have abandoned their office of independent judgment in accord with the law of the land, and they have engaged in systematically biased judgment in violation of the due process of law.

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83 *See, e.g.*, United States v. Klein, 80 U.S. (13 Wall.) 128, 144–48 (1871) (holding that Congress may not debar a court from considering a question of law arising in a case within its jurisdiction); Liebman & Ryan, *supra* note 4, at 864–73 (arguing against the constitutionality of federal court deference to state decisions under the AEDPA).

III. EXCUSES FOR *CHEVRON* DEFERENCE

There have been excuses for the judicial deference to administrative interpretation. None of the excuses, however, stand up to examination. None really confront how judicial deference conflicts with the judicial office or duty of independent judgment and the constitutional right to the due process of law.[84]

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84 Of course, not all of the possible excuses can be discussed in the text here. Among those omitted from the text, the historical excuses are particularly interesting.

Thomas Merrill urges that *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), can be read to justify a two-step analysis akin to that of *Chevron*. Thomas W. Merrill, Marbury v. Madison *as the First Great Administrative Law Decision*, 37 J. MARSHALL L. REV. 481, 498–99 (2004). He notes that *Marbury* distinguishes between the power in which the President and his agents are confined by legal duties and the political power or discretion they may exercise without being accountable, except politically and in their consciences. *Id.* On this basis, Merrill concludes that *Chevron* deference to administrative interpretation is not unlike *Marbury*'s recognition of discretion in the exercise of political power. *Id.* The political power discussed by *Marbury*, however, was different from agency interpretation of statutes. For one thing, when discussing the political power, *Marbury* explained that its "subjects are political," that they "respect the nation, not individual rights"—something that cannot be said of the agency interpretations that qualify for *Chevron* deference. *Marbury*, 5 U.S. (1 Cranch) at 166. In addition, the political power discussed by *Marbury* did not include any authority to usurp the power of judges to say what the law is. *Id.* at 177–78. Of course, executive officers (like all Americans) often had to interpret the law for their own purposes, if only to figure out what they could or could not lawfully do, but the office or duty of independent judgment about what the law is belonged to the judges in their cases. *Id.* Accordingly, the power to say what the law is cannot be considered part of the "political power" explained in *Marbury*, and it is no surprise that most administrative law scholars do not rely on *Marbury*.

Many, instead, claim that already in *United States v. Vowell & M'Clean*, 9 U.S. (5 Cranch) 368 (1809), the Supreme Court opined in favor of deference to agency interpretation, but this argument is based on a strange misreading. As I have explained elsewhere:

> In 1809, in *United States v. Vowell*, the Supreme Court held that the defendant, an importer, did not owe duties under an act of Congress. Writing for the Court, Chief Justice Marshall explained that, "If the question had been doubtful, the court would have respected the uniform construction which it is understood has been given by the treasury department of the United States upon similar questions." When taken out of context, this quotation has seemed to reveal a historical foundation for judicial deference. Such a conclusion, however, misunderstands the case.
>
> The defendant had relied on prior treasury interpretations, and the Treasury now was asking the Court to reach a decision contrary to the Treasury's prior interpretations. In these circumstances, Marshall was simply observing that, even if the statute had not so clearly justified the defendant, the Court still would have held for him. That is, it would have respected the Treasury's prior interpretations for the defendant's sake, not the Treasury's. Rather than judicial deference to administrative interpretation, this was a recognition of something like reliance, estoppel, or waiver.

PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 295 n.a (2014) (quoting *Vowell*, 9 U.S. (5 Cranch) at 372).

Adding to the alleged historical justifications, Peter Strauss argues that there are later nineteenth century precedents for *Skidmore*, writing that "[c]ases reaching back well into the nine-

A. *Other Deference, Including Presumptions*

One apology for judicial deference to administrative interpretation is that judges sometimes defer in other matters. There are many alleged instances of judicial deference, and most are not worth pursuing in detail here. Some, however, are particularly salient.

There are occasions, for example, when the courts allegedly defer to the other branches of government. It is said that, under the Constitution's guarantee of republican government, judges defer to the judgment of Congress.[85] In foreign and military policy, moreover, it often is claimed that judges defer to the judgment of the Executive.[86] Why, then, should they not defer to the judgment of executive and other administrative agencies in their interpretation of statutes?

The explanation is that most of the alleged "deference" that might seem to justify *Chevron* deference is not really deference to the other branches of government. Ideally, judges can defer only to the law, and although they sometimes say they are deferring to the other branches, they usually are merely recognizing that the Constitution allocates power over some matters to another branch, whether Congress or the Executive. In other words, judges typically are merely exercising judgment about the law.[87] This explains the judges' decisions about the republican form of government and most of their decisions about foreign and military matters. Most of this alleged deference to other branches is thus not really deference, and it is

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teenth century had reasoned that settled administrative interpretations, or administrative interpretations contemporaneous with enactment, are 'entitled to very great respect,' and ought not be disturbed if they are possibly within the meaning of statutory language, or 'overruled without cogent reasons.'" Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them* "Chevron *Space" and* "Skidmore *Weight"*, 112 COLUM. L. REV. 1143, 1154 (2012) (quoting Edwards' Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827) and United States v. Moore, 95 U.S. 760, 763 (1877)). Notwithstanding these quotations, none of the pre-Civil War cases cited by Strauss really supports his claim. An 1827 case relied upon by Strauss concerned a "cotemporaneous construction" by commissioners that also "seems to have received, very shortly after, the sanction of the legislature." *Darby*, 25 U.S. (12 Wheat.) at 210. An 1832 case was really about recognizing reliance on long-standing constructions. United States v. State Bank of N.C., 31 U.S. (6 Pet.) 29, 39 (1832). Only the 1877 case mentioned by Strauss suggested something closer to deference, but that was from the era when federal administrative power already was beginning to develop. *See Moore*, 95 U.S. at 763.

85 Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849) (holding that the Constitution places the power to recognize a state government in Congress).

86 *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936) (describing the President as the "sole organ of the federal government in the field of international relations").

87 *See Luther*, 48 U.S. (7 How.) at 40; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

doubtful whether judges can engage in further deference to other branches without giving up their independent judgment.

The deference to administrative interpretation, moreover, is unusually systematic and sweeping, and it therefore cannot easily be justified by lumping it together with occasional deference to Congress or the Executive in other matters. After one has put aside the alleged "deference" that can be explained simply as a recognition of the Constitution's allocation of power to other branches, the remaining deference is relatively episodic and narrow. Thus, even if judges sporadically could put aside their duty of independent judgment to defer to the legislative and executive branches in some matters, this cannot excuse their persistent and expansive deference in administrative matters.

The alleged deference to the Executive in foreign and military matters is particularly unpersuasive as a justification for deference to administrative interpretation because it often comes with dark hints that it rests not only on law but also on necessity—indeed, a dire and unpredictable necessity.[88] Leaving aside whether any such necessity really can override the judges' duty of independent judgment, the extreme and unpredictable necessity that appears to underlie deference to the Executive in foreign and military matters cannot ordinarily be found in domestic policy.[89] The supposed deference to the Executive in foreign and military affairs is therefore an especially poor excuse for deference to administrative interpretation.

A more regular form of deference that may be thought to justify *Chevron* deference is *Pullman* abstention.[90] Under this doctrine, federal courts will abstain "from deciding an unclear area of state law that raises constitutional issues because state court clarification might serve to avoid a federal constitutional ruling."[91] This really is deference—indeed, a regularly occurring sort—but it is deference to other judges, who at least have the office of independent judgment, rather

88 *See Curtiss-Wright*, 299 U.S. at 320 ("[The President], not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war.").

89 *See id.* ("It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation . . . must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.").

90 R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941).

91 Nivens v. Gilchrist, 444 F.3d 237, 245 (4th Cir. 2006) (citing R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941)).

than to parties. In this sense, as will be seen in Part V, it is like deference to judicial precedent.[92]

In searching for a sort of deference that might justify *Chevron*, one might turn to Thayerian deference. Since the Founding, American lawyers have said that judges should hold statutes unlawful only if they are "manifestly" or "evidently" contrary to the Constitution.[93] James Thayer proposed that this rule was an expression of judicial deference to "the legislative action of a co-ordinate department," and if Thayer was right, a type of deference has long been considered compatible with the judges' duty of independent judgment.[94] In fact, the manifest or evident contradiction rule had not been a standard of judicial review, let alone of deferential review, but rather had been the substantive measure of when a law contradicted a higher law and thus lost its legal obligation.[95] If a law was not manifestly or evidently contrary to a higher law, one could not conclude with confidence that it was unlawful and void. As put by one commentator, the contradiction "must be manifest: for if it be doubtfull, the law retains her power."[96] On this sort of reasoning, lawyers understood manifest or evident contradiction to be the measure of when a law conflicted with a higher law and thus was unlawful and void, and, tellingly, they applied this measure to all sorts of acts, not merely legislative acts.[97] Thayer recast this measure of contradiction as a standard of deference to legislative acts, and when stated in these Thayerian terms, the manifest or evident contradiction rule may seem like a sort of deference.[98] But the manifest contradiction rule was really the substantive measure of contradiction, and thus, rather than a standard of deference, it is better

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92 Yet other alleged examples of judicial deference involve the deference of judges to their clerks and to masters in chancery. Clerks and masters, however, traditionally were understood to act in merely ministerial capacities, leaving judgment in cases to the judges. For details and variations, see PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 397 (2014).

93 PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 312 (2008).

94 James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 150–52 (1893); *see* Nicholas S. Zeppos, *Deference to Political Decisionmakers and the Preferred Scope of Judicial Review*, 88 NW. U. L. REV. 296, 299 (1993) (comparing *Chevron*'s judicial deference to Thayer's judicial deference).

95 PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 309 (2008).

96 JEREMY TAYLOR, 3 DUCTOR DUBITANTIUM, OR THE RULE OF CONSCIENCE 411 (London, James Flesher 1660).

97 PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 309–11 (2008). For example, manifest error was the measure for evaluating judicial acts under a writ of error. *Id.* at 309. For the records of writs of error, see JOHN TREMAINE, PLACITA CORONAE: OR PLEAS OF THE CROWN, IN MATTERS CRIMINAL AND CIVIL 204, 314 (John Rice ed., London, E. & R. Nutt & R. Gosling 1723) ("'manifest' est errat'").

98 *See* Thayer, *supra* note 94, at 151.

understood as a rule as to how judges should understand the contradiction between two layers of law. And even if it were deference, it would not be deference to anyone else's interpretation or to any party's legal position. It thus is yet another inadequate excuse for deference to administrative interpretation.

Additionally, some presumptions may be thought to justify *Chevron* deference. It is difficult, however, to find a presumption that, like *Chevron* deference, ordinarily requires judges to defer to the judgment of others (apart from other judges) or that requires them to engage in systematic bias in favor of the legal position of one of the parties before them.[99] Some presumptions—such as *res ipsa loquitur* and the presumption of trade usage in contract—concern things rather than persons, and these obviously do not offer support for *Chevron* deference, as they do not require judges to defer to anyone else's judgment about what the law is or predictably to favor the legal position of any particular party.[100] Other presumptions favor types of parties, but these also offer little justification, as they favor classes of persons rather than a specified party, and because they generally do not require the judges to defer to the judgment of others about the law.

The rule of lenity, for example, does not require the judges to rely on any other person's judgment about what the law is. Instead, it instructs the judges about what the law is or at least how to interpret it—as one might expect given its constitutional foundation in the due process principle that that one is innocent until proven guilty. And rather than favor any one party that comes before the courts, it protects all criminal defendants, and it thus is available for the benefit of all Americans whenever they find themselves facing criminal charges. Being neither a rule of deference nor of judicial bias, it cannot justify *Chevron* deference.

The clear statement presumptions that limit federal preemption of state law and federal abrogation of state sovereign immunity are versions of the manifest contradiction rule.[101] Rather than favor any one party, they favor a type of entity. And in guiding judges in the exercise of their own judgment—on the basis of the underlying consti-

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99 A presumption that is a sort of deference is *Pullman* abstention, and it therefore is discussed above as a type of deference rather than as a mere presumption.

100 *Res ipsa loquitur*, Black's Law Dictionary

101 Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) (sovereign immunity); Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) (preemption); Schwartz v. Texas, 344 U.S. 199 (1952) (preemption). .

tutional logic about contradictory laws—these presumptions do not require the judges to defer to anyone else's judgment about what the law is.

Chevron deference thus finds little comfort in other deference and presumptions. *Chevron* deference to administrative interpretation sharply conflicts with the judicial duty of independent judgment and the right to the due process of law, and it therefore cannot be swept under the rug with analogies to sporadic, extreme, and dubious instances of other deference. Nor can it be justified by deference to other judges, or by presumptions that do not favor any particular party and do not require deference to the judgment of others. On the contrary, the strained character of the analogies to other deference is a reminder of what really is needed: not feeble excuses, but a candid recognition of how *Chevron* deference conflicts with judicial office and the due process of law.

B. Interpretation as a Mode of Lawmaking?

Another way of sidestepping the conflict has been to view administrative interpretation as a mode of lawmaking. From this perspective, the "interpretation" done by administrative agencies is merely a form of lawmaking, and it thus is not a threat to the judicial role.[102] Such an argument is correct in assuming that agencies use their interpretation of statutes as a means of making law, but it goes too far when it assumes that administrative interpretation therefore is not an attempt to say what the law is. Undoubtedly, interpretation can function as a mode of making law, but this does not mean it is not also interpretation.

The suggestion that administrative interpretation is merely a mode of lawmaking has been presented most thoughtfully by Henry Monaghan, who urges that when judges defer to administrative interpretation, they are simply recognizing that Congress has placed lawmaking power in administrative agencies.[103] The implication is that administrative interpretation is a legislative, rather than a judicial function, and that it therefore does not detract from the duty of judges

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102 *See, e.g.*, Monaghan, *supra* note 43, at 6.

103 Whenever courts speak of "judicial deference . . . to an administrative 'interpretation' of a statute," this should be "understood as a judicial conclusion that some substantive law-making authority has been conferred upon the agency." *Id.*; *see* Richard J. Pierce, Jr., Chevron *and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 304 (1988) (distinguishing a court's review of an agency's resolution of a policy issue from its review of an issue of law); Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 308–09 (1986) (echoing Monaghan).

to say what the law is. Thus, when judges defer to administrative "interpretation," they merely are acknowledging the statutory boundaries of agency lawmaking authority and are not deferring to an administrative judgment about what the law is.[104]

But this vision of the lawmaking character of administrative interpretation is overstated. Certainly, administrative agencies use their interpretation of statutes as a mode of making law.[105] But, at the same time, the agencies are stating what the law is—in particular, they are stating what is authorized and required by acts of Congress. It therefore is an exaggeration to say that administrative interpretation of a statute is lawmaking, unless one promptly adds that it also is interpretation—a judgment about what the law is.

This combination of lawmaking and interpretation is no secret, for it is fundamental to the standard indeterminacy justification for the administrative power to interpret. When Congress uses open-en-

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104 "[O]nce the delegation of law-making competence to administrative agencies is recognized as permissible, judicial deference to agency interpretation of law is simply one way of recognizing such a delegation." Monaghan, *supra* note 43, at 7.

In defense of the view that judges, under *Chevron*, are merely deferring to Congress's delegation of lawmaking authority, one colleague has proposed a rewriting of that case. From his point of view, the Supreme Court in *Chevron* made an unfortunate choice of words when it wrote about "permissible" interpretation. Instead, it should be understood to have meant simply that it would defer to any "reasonable" interpretation—a standard that could be understood as indicative of a delegated lawmaking power, without any reliance on ideas of interpretation. Indeed, *Chevron* concludes that the EPA's interpretation was "a reasonable policy choice for the agency to make"—phrasing that sounds like deference to lawmaking. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 845 (1984). The Court, however, carefully did not conflate the question of what was "reasonable" with what was "permissible;" nor did it reduce the second step of its *Chevron* doctrine merely to reasonableness. *Id.* at 842–45.

In fact, the second step of *Chevron* comes in three layers. The general test of interpretation, according to the Court, is to ask whether an agency's interpretation is "permissible." *Id.* at 843. Second, when inquiring whether an agency interpretation is permissible, the court must determine whether it "is a reasonable one." *Id.* at 845. As explained by *Chevron*, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 844. Third, the court must ask whether the agency's choice of interpretation is otherwise contrary to congressional intent: "If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id.* at 845 (quoting United States v. Shimer, 367 U.S. 374, 383 (1961)). The question about reasonableness is thus framed by the initial question of whether the agency interpretation is permissible and by the follow-up question of whether it goes beyond congressional intent.

105 INS v. Chadha, 462 U.S. 919, 985–86 (1983) (White, J., dissenting) ("For some time, the sheer amount of law—the substantive rules that regulate private conduct and direct the operation of government—made by the agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process. There is no question but that agency rulemaking is lawmaking in any functional or realistic sense of the term.").

ded or otherwise indeterminate statutory phrasing to authorize an agency, Congress is assumed to be giving the agency the power to interpret the statute. The agency's power to make law in this way thus rests on ideas of interpretation—on ideas about the agency's need to interpret its indefinite authorizing statute. And this indeterminacy justification makes it very odd to conclude that administrative interpretation is merely lawmaking, not interpretation.

The Supreme Court repeatedly acknowledges that it defers not to agency lawmaking, but to agency interpretation of statutes. In *Chevron*, the Court declares:

> [T]he court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[106]

The Court itself thus concludes that what is owed deference is an agency's "interpretation" or "construction."[107]

The excuse that administrative interpretation is merely lawmaking thus conflates what the Supreme Court has persistently differentiated. If the Justices have been mistaken in recognizing agency interpretation as interpretation, why have none of them corrected themselves—why have none of them clarified that that it is not interpretation? And if, after so many decades, they conclude it is not interpretation, not even partly interpretation, let them explain why, so late in the day, they are changing their minds. In the meantime, the insistence of a handful of academics that it is merely lawmaking looks utterly unrealistic.[108]

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106 *Chevron*, 467 U.S. at 843.

107 *Id.* at 844.

108 The justification of *Chevron* deference as deference to delegated lawmaking is especially weak because it relies on a theory that the Supreme Court rejects in its account of expressly authorized agency rulemaking. According to the Court, when agencies have express statutory authorization to make rules, the agencies are not exercising a delegated lawmaking power, but rather are merely administering or specifying what is expressed in the statutes, and the agencies therefore are merely exercising executive power, not legislative power. Mistretta v. United States, 488 U.S. 361, 372, 419 (1989) (quoting J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928)); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529–30 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 425–27 (1935). In other words, congressional delegation of legislative power is not the theory of agency rulemaking. Accordingly, how can it be the foundation of agency interpretation? It is absurd to justify agency interpretation as delegated lawmaking, when the Court does not justify even expressly authorized agency rulemaking on such grounds. If delegation does not justify judicial acceptance of expressly au-

Of course, in their administrative interpretation of statutes, agencies create law, but they simultaneously judge what the law is. And for clarity about this, an analogy is useful. It is widely recognized that judges often use their interpretation as a mode of lawmaking. It would be a gross overstatement, however, to conclude from this that judicial interpretation is not at all interpretation—that it is merely lawmaking.

In the end, the excuse that administrative interpretation is merely lawmaking collapses under the reality that it also is interpretation—a judgment about what the law is. Even when agencies use their interpretation candidly to make policy, judges defer to it on the ground that it also is interpretation. It therefore is difficult to avoid the conclusion that, when judges defer to administrative interpretation, they rely on administrative judgments about the law and thereby abandon their duty to reach their own independent judgment. Judges have a duty in their cases to decide for themselves what the law is, and they cannot do this if they are deferring to agency interpretations.

C. Administrative Cases Different from Constitutional Cases?

Yet another way to avoid the constitutional problems has been to distinguish between the duty of judges in constitutional cases and their duty in administrative cases—the point being to suggest that judges have a less searching duty in the administrative decisions. Again, Henry Monaghan's version of this argument is particularly thoughtful.[109] In attributing different duties to judges in different types of cases, however, his argument divides things that are not really divisible.

After presenting agency interpretation as merely a mode of lawmaking, his argument suggests that the courts, in cases of administrative interpretation, need only determine the boundaries of the agencies' authority to make law.[110] If agency interpretations were only lawmaking and not interpretation—and if this form of lawmaking were constitutional—it could make sense to conclude that the duty of judges to interpret, or say what the law is, does not require them to

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thorized agency rules, how can it justify judicial deference to agency interpretation? The sauce that is unpalatable on a goose is equally unpalatable on a gander.

The oddity of the delegation justification is all the greater because Congress at least has lawmaking power, but it does not have judicial power, and it cannot delegate a power it does not have. U.S. CONST. art. I, § 1; *id.* art. III, § 1. Thus, if delegation is a justification of anything, it is a better justification of agency rulemaking than of agency interpretation.

109 *See* Monaghan, *supra* note 43, at 6.

110 *See id.* at 6, 25–28.

second-guess agency interpretations. From this point of view, "[t]he court's interpretational task is . . . to determine the boundaries of delegated authority."[111]

But agency interpretations of statutes are not merely instances of delegated lawmaking. They also are interpretations—that is, they also are the judgments of agencies about what the law is.[112] And judges therefore cannot defer to agency interpretations without abandoning their judicial duty to make their own independent judgments about the law.

When the realities of agency interpretation are recognized—when it is understood that such interpretation involves both lawmaking and interpretation—it becomes apparent that Monaghan's argument proposes that judges have different duties in administrative and constitutional cases.[113] According to Monaghan, whereas judges in constitutional decisions have the "interpretational duty . . . of supplying the full meaning of the relevant constitutional provisions," judges in administrative interpretation decisions merely have the "interpretational task" of "determin[ing] the boundaries of delegated authority."[114] The suggestion is that judges have different duties in different cases, such that their role is "circumscribed" when they encounter administrative interpretations.[115]

This is problematic at the very least because of its assumption that one can distinguish administrative cases from constitutional cases. All administrative power, including administrative interpretation,

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111 *Id.* at 6. Monaghan writes:

> [J]udicial review of administrative action contains a question of the allocation of law-making competence in every case, given congressional power to delegate law-making authority to administrative agencies. The court's interpretational task is (enforcement of constitutional restrictions aside) to determine the boundaries of delegated authority. . . . Where deference exists, the court must specify the boundaries of agency authority, within which the agency is authorized to fashion authoritatively part, often a large part, of the meaning of the statute. By contrast, to the extent that the court interprets the statute to direct it to supply meaning, it interprets the statute to exclude delegated administrative law-making power. In this context, the agency view of what the statute means may persuade, but it cannot control, judicial judgment.

Id. at 6.

112 *See supra* Section III.B.

113 To be sure, his argument concludes that the "circumscribed role" of judges in administrative interpretation cases "is not unlike the judicial role in much constitutional adjudication." Monaghan, *supra* note 43, at 7. This weak conclusion, however, is telling. It is nearly a recognition of different judicial roles. *See id.*

114 *Id.* at 6.

115 *Id.* at 7.

raises constitutional questions, and it therefore is unclear how the administrative cases can really be differentiated.

An even more basic problem is the assumption that judges should apply the Constitution with a lighter hand where the government exercises power outside the Constitution's structures of power. In the absolutist traditions of the civil law, it was expected that a king could evade regular lawmaking and adjudication by binding his subjects through prerogative or administrative rules, and by having commissions bind his subjects through prerogative or administrative adjudication. From this point of view, regular and constitutional paths of power were merely optional, and on this understanding, kings and their civilian advisors urged judges not to interfere with prerogative or administrative interpretation—the underlying justification being that questions of state or prerogative rose above the law and that the judges therefore had to defer.[116]

Drawing on this absolutist heritage, nineteenth-century German theorists and their American followers, such as Woodrow Wilson, distinguished administrative and constitutional questions. Wilson wrote: "The broad plans of governmental action are not administrative; the detailed execution of such plans is administrative. Constitutions, therefore, properly concern themselves only with those instrumentalities of government which are to control general law."[117] Administrative power, in other words, was not to be fully accountable under constitutional law.

In the common law tradition, however, especially in the United States, all government power came to be subject to law—in particular, to the country's constitution. A central reason for developing constitutional law in the seventeenth and eighteenth centuries was to defeat

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116 Drawing upon civilian ideas of absolute power, James I famously insisted that matters within "the absolute Prerogative of the Crowne" were not "to be disputed" in the courts. James I, King of England, A Speach in the Starre-Chamber (June 20, 1616), *in* THE POLITICAL WORKS OF JAMES I 326, 333 (Harvard Univ. Press 1918) (1616). Similarly, in seventeenth-century Prussia, it was said that "Regierungssachen sind keine Justizsachen"—that, matters of state are not judicial matters. PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 463 (2014); *see also* R. C. VAN CAENEGEM, AN HISTORICAL INTRODUCTION TO WESTERN CONSTITUTIONAL LAW 135–37 (1995).

Interestingly, James was echoing civilian ideas that were already being espoused by some of the judges. *See* David S. Berkowitz, *Reason of State in England and the Petition of Right, 1603–1629*, *in* STAATSRÄSON: STUDIEN ZUR GESCHICHTE EINES POLITISCHEN BEGRIFFS 169, 175–77 (1975) (regarding the views of Baron Clarke, Justice Fleming, and King James).

117 Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 212 (1887). For further details of such arguments and their context, see PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 292 (2014).

claims of a binding prerogative or administrative power that was to be treated with deference, and it therefore is contrary to the very nature of American constitutional law to suggest that judges should lighten up when the government acts outside the structures of power established by the Constitution.[118] This rewards the government for acting outside those structures, thus giving the government incentives to evade them.

It therefore is puzzling to read suggestions that judicial deference does not conflict with judicial duty because judges have different roles in administrative cases. This is as much as to say that when government acts through administrative power, rather than the structures of power established by the Constitution, it should be subject to constitutional law lite.

The argument that judges have different tasks in administrative cases is thus more troubling than reassuring. It is yet another attempt to avoid confronting the conflict between judicial deference and judicial duty, and it avoids the conflict only by suggesting that the government can avoid the full weight of constitutional law by acting administratively. Rather than a solution, this looks like just another type of systematic judicial bias.

D. Departmentalism

A further excuse for deference is departmentalism. From this perspective, each department or branch has authority, within its sphere, to interpret the Constitution as to the department's own constitutional powers in relation to the other departments.[119] James Madison and some other Virginians embraced this view in the 1780s, and although they did not suggest that it might justify administrative power, contemporary scholars have deployed it to this effect.[120]

As it happens, departmentalism was not widely accepted in the late eighteenth century outside Virginia.[121] Instead, in the more conventional approach to interpretation, only judges had an office that required them to exercise independent judgment in accord with the law of the land.[122] Accordingly, only judges had an office of expounding the law, and this gave authority to their expositions.[123] This

118 *See* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 291–94 (2014).

119 PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 551 (2008).

120 *Id.* at 550–54.

121 *See id.* at 552.

122 *Id.* at 316, 552.

123 *See id.* at 218–34, 543–54.

understanding of judicial authority was centuries old, and even Madison did not question it outside structural constitutional questions.[124]

More to the point, the departmentalist view of interpretation offers no justification for judicial deference. Although it can justify the executive in interpreting its own constitutional powers in relation to the other departments, it cannot justify the executive in relying on its constitutional interpretations in relation to the public.

Nor can the departmentalist argument justify judges in giving up their own independent judgment in expounding statutes or any other part of the law. The whole point of the departmentalist view is that the different departments have equal interpretative authority within their *own spheres* to expound their own power under the *Constitution*. Thus, whatever departmentalism shows about executive interpretation of the Constitution, it reveals nothing about the duty of the judges in expounding *statutes*. More generally, whatever departmentalism shows about the executive's authority in its sphere, it does not thereby displace the power and duty of judges to interpret in their own sphere—namely, cases. On the contrary, because cases are the exclusive sphere of the judicial department, the departmentalist theory precludes any legislative or executive interference with judicial interpretation.

The excuses evidently are distractions. It is therefore a mistake to linger on the excuses for judicial deference. Instead, it is time to recognize how seriously the deference conflicts with the duty of independent judgment and the right of due process.

IV. The Depth of the Constitutional Problem

The constitutional problem is much more serious than has been understood. Rather than being merely a technical problem of administrative power, judicial deference is a profound danger.

A. Not a New Controversy

To understand the depth of the danger, one must begin by stepping back in history—not to be an originalist—but to see that deference is an old and serious problem, which was addressed by the Constitution. It may be assumed that deference to agency interpretation is a new question and that it therefore could not have been antici-

124 *See id. at* 551.

pated by Constitution. In fact, judicial deference has long been a profound danger, and the Constitution responded to it.

Roman emperors already claimed that because they were the lawmakers, they could engage in lawmaking interpretation in the interstices of written enactments.[125] Echoing this ancient power, civilians urged that kings also could interpret statutes where they were indeterminate, and, following the Imperial Roman model, this was not merely a power to expound law in the manner of a judge, but a power to engage in lawmaking where the law was indeterminate.[126]

This sort of lawmaking interpretation came into conflict with English law most dramatically under James I. It may seem odd to associate allegedly modern administrative interpretation with the English monarch most closely associated with absolute power, but James is an essential figure in the history of judicial deference.

James sought to govern not merely through the laws made in Parliament, but through the rules and interpretations issued by his prerogative tribunals. What we call "administrative agencies" once were called "prerogative courts," and James used these bodies to govern extralegally—not through law, but through prerogative edicts.[127]

Prerogative power thus was a precursor of administrative power, and like contemporary administrative agencies, the prerogative tribunals engaged in lawmaking interpretation. James systematically sought to persuade the judges of the law courts that his prerogative tribunals could interpret where statutes were indeterminate and that the judges had to defer to such interpretation.[128]

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125 According to Justinian's *Digest*, the emperor was the lawmaker, and thus "whenever a new contingency arises," it was the "the imperial function" to "correct and settle it"—or as Julian had written, "if anything defective be found, the want should be supplied by imperial legislation." 1 THE DIGEST OF JUSTINIAN lix–lx (Alan Watson ed., rev. English language ed. 1998). From this perspective, much of what common lawyers would consider the exposition of law was actually lawmaking, and although the *Codex* permitted judges to decide cases according to their understanding of the law, it precluded any authority for judicial exposition of the law—cautioning, in the words of Constantine: "It is part of Our duty, and is lawful for Us alone to interpret questions involving equity and law." *Codex (I.xiv)*, *in* 12 THE CIVIL LAW 85, 85 (S. P. Scott ed. & trans., 2d ed. 1932); *see id.* at 88–89.

126 *See* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 51–55 (2014).

127 *See id.*

128 Already when James was a child, his learned tutor, George Buchanan, bluntly warned: "I shall tell you . . . plainly, that you may understand it. When you grant the interpretation of Lawes to a King, you grant him such a licence, as the Law doth not tell what the Lawgiver meaneth, or what is good and equall for all in generall, but what may make for the Interpreters benefit . . . ." GEORGE BUCHANAN, DE JURE REGNI APUD SCOTOS, OR, A DIALOGUE, CONCERNING THE DUE PRIVILEGE OF GOVERNMENT IN THE KINGDOM OF SCOTLAND, BETWIXT GEORGE BUCHANAN AND THOMAS MAITLAND 44 (Philalethes trans., 1680). This royal interpre-

Although the resulting dispute was about the interpretative power of James's prerogative tribunals, it was framed in terms of his Roman style imperial power. He therefore insisted that, by "beinge the author of the Lawe," he could be "the interpreter of the Lawe."[129] When the judges protested, he memorably added: "If the Judges interprete the lawes themselves and suffer none else to interprete, then they may easily make of the laws shipmens hose."[130]

The judges, however, as early as 1608, refused to defer to prerogative interpretations, and with good reason.[131] On the one hand, because the king and his prerogative or administrative tribunals did not have the office of a judge, they could not expound the law with authority—that is, they could not make authoritative interpretations.[132] On the other hand, because the judges had judicial office, they had to expound the law in accord with their own independent judgment about the law.[133] Physically, of course, they had to bow to the king.

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tation would make law "useless," for if it were admitted, "it will be to no purpose to make good Lawes for teaching a good prince his duty; and hemme in an ill king. Yea, let me tell you more plainly, it would be better to have no Lawes at all . . . ." *Id.* James respected his tutor, but what he thought of this plain speaking can only be imagined.

Shortly after James became king of England, his advisors encouraged him to assert the Imperial Roman style power of "interpretation." One civilian explained about James that "his judges interpretation maketh right only to them betweene whom the cause is, but his highness['s] exposition is a Law unto all, from which it is not lawful for any subject to receed." THOMAS RIDLEY, A VIEW OF THE CIVILE AND ECCLESIASTICAL LAW 211–12 (London, Co. Stationers 1607). The next year, Chancellor Ellesmere argued that when judges faced a question where the law was doubtful, the judges should leave it to the king's "interpretation." Lord Chancellor Ellesmere, The Speech of the Lord Chancellor of England, in the Eschequer Chamber, Touching the Post Nati (1608), *in* LAW AND POLITICS IN JACOBEAN ENGLAND: THE TRACTS OF LORD CHANCELLOR ELLESMERE 202, 248–49 (Louis A. Knafla ed., 1977).

129 CAESAR'S NOTES, *reprinted in* Roland G. Usher, James I and Sir Edward Coke, 18 ENG. HIST. REV. 664, 673 (1903) (recounting Sir Julius Caesar's observation of the debate between Sir Edward Coke and James I).

130 *Id.* at 669.

131 *See* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 222–25 (2008); PROHIBITIONS DEL ROY, *in* 7, 12 THE REPORTS OF SIR EDWARD COKE, KNT. 63, 63–65 (George Wilson ed., 5th ed., London, n.pub. 1777).

132 *See* PROHIBITIONS DEL ROY, *supra* note 131, at 64.

133 These points were implicit in the report of *Prohibitions del Roy*, such as when Coke reported his argument that, although "the King may sit in the Star-chamber; . . . this was to consult with the Justices . . . and not *in judicio*," and when he reported that all the judges informed James that "no king after the Conquest assumed to himself to give any judgment in any cause whatsoever, which concerned the administration of justice within this realm, but these were solely determined in the courts of justice." *Id.* Legal commentators made such points explicit. For example, Roger Twysden wrote that the king had no prerogative or administrative power of interpretation, for "hee cannot alone, but in his courts of justice, by sworne judges, interpret those laws, whose office it is . . . to expound . . . ." ROGER TWYSDEN, CERTAINE CONSIDERATIONS UPON THE GOVERNMENT OF ENGLAND 87 (John Mitchell Kemble ed.,

James I at one point spoke to the judges so severely that they all got down on their knees.[134] But even when on his knees, Coke spoke back.[135] He refused to defer to anything but the law.[136]

Like Coke, the U.S. Constitution rejects deference to executive interpretation. It places the judicial power in the courts, and it staffs the courts with judges who are understood to have an office of independent judgment.[137] Each of them, therefore, has a personal duty, in each case, to reach his own independent judgment about the law.

The duty of judges to exercise independent judgment is of particular interest because it was the foundation of the judges' authority to hold statutes unconstitutional.[138] Judges were bound in their office to decide cases by exercising independent judgment in accord with the law of the land, including not only statutes but also the constitutions of their states and the United States.[139] On this basis, even before the Constitution was drafted, state judges held state statutes unconstitutional under state constitutions and even under the Articles of Confederation.[140] In retrospect, judges are said to have exercised a newfangled power of "judicial review."[141] At the time, however, they more simply understood that, by virtue of their office or duty as judges, they had no choice but to exercise independent judgment in accord with the law of the land, even if this meant holding unconstitutional government acts unlawful.[142] This was what Chief Justice John Marshall was referring to when, in *Marbury v. Madison*, he wrote: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of

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London, J. B. Nichols & Son 1849) (internal citation omitted). Bacon's *Abridgment* similarly explained that "[t]he King cannot execute any Office relating to the Administration of Justice, altho[ugh] all such Offices derive their Authority from the Crown, and although he hath such Offices in him to grant to others." 4 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 190 (4th ed., London, W. Strahan & M. Woodfall 1778) (internal citation omitted).

134 *See* CATHERINE DRINKER BOWEN, THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE (1552–1634) 373 (1957) (describing the controversy over commendams).

135 *Id.*

136 *Id.* ("Coke, still on his knees, raised his face to the King. . . . [and] said . . . '[t]he stay required by your Majesty was a delay of justice and therefore contrary to the law and the Judges' oath.'").

137 U.S. CONST. art. III.

138 PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 104–06, 159–63, 179, 406–61 (2008) (discussing the office and decisions of judges).

139 *Id.* at 316–26, 587–605.

140 *Id.* at 395–461, 597–602.

141 *Id.* at 217.

142 *Id.* at 395–461.

necessity expound and interpret that rule."[143] His words are a reminder of the centrality of ideas of judicial office in American law. Of particular importance here, his words are a reminder that judges have a duty to exercise their own independent judgment and that therefore they themselves must interpret the law.

The Constitution's rejection of deference is also apparent in the Fifth Amendment right of due process.[144] It is commonly said that administrative tribunals need to provide only *the process that is due*, and whether this pale imitation of due process is enough can be left for resolution elsewhere.[145] What is at stake here is the due process of law in Article III courts. There is no doubt that judges must provide the due process of law in their courts, and under this constitutional right, judges cannot systematically engage in bias, whether in favor of the government or its defendants. Judges, however, now defer, and they thereby participate in systematic bias. Deference to administrative interpretation is a systematic precommitment in favor of the interpretation or legal position of the most powerful of parties, and it is something federal judges would never have done in an earlier era, when they still remembered the old dispute with James I.

Contemporary judges never physically bend their knees to anyone. Nonetheless, mentally and legally, they regularly bow to the executive, deferring to its judgment about what the law is. James would have been impressed. He thought monarchy was necessary for deference, but Americans now have James's doctrine of deference in a republic.

B. Structural Relocation of Judges to the Executive

The extent to which judicial deference to administrative interpretation is a departure from the judicial office of independent judgment, and from the right to due process of law, becomes further apparent when one recognizes the ways in which the deference shifts the structural location of judicial power. Of course, judges formally remain officers of their courts; but when they defer to the executive (or to

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143 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Similarly, in the context of discussing judicial decisions holding statutes unconstitutional, Hamilton wrote: "The interpretation of the laws is the proper and peculiar province of the courts." THE FEDERALIST NO. 78, *supra* note 56, at 525.

144 U.S. CONST. amend. V.

145 For the due process problem, see PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 165–74, 237, 254–56 (2014) (arguing that the due process of law developed as a constitutional right in response to prerogative or administrative proceedings, and that it thus applies centrally to these proceedings as well as court proceedings).

agencies even partially accountable to the executive), it is difficult to avoid the structural implication.

Judges had long been understood in England to have an office of independent judgment, and in this sense, they were understood to have a distinct role in government.[146] Indeed, as early as the fourteenth century, a prominent English treatise distinguished the legislative, judicial, and executive powers.[147]

It would be a long time, however, before judges were typically viewed as holding a power genuinely separate from the Crown or executive. One reason was that the English judges, as a formal matter, had been servants of the Crown, and thus, at least in name, they were royal or "executive" officers.[148] More substantively, the judges up through the seventeenth century were sometimes expected by the Crown to defer to its claims of prerogative. As long as it was feared that some of the judges might defer, it was difficult to avoid the conclusion that, not only in form, but also in reality, they were royal or executive officers. The philosopher John Locke therefore assumed that, in matters of executive power, the judges would not predictably

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146 PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 149–50 (2008).

147 An important fourteenth-century treatise on Parliament, *Modus Tenendi Parliamentum*, discussed legislation "against defect of laws 'original, judicial, and executive.'" FRANCIS D. WORMUTH, THE ORIGINS OF MODERN CONSTITUTIONALISM 60 (1949); *see also* M. V. CLARKE, MEDIEVAL REPRESENTATION AND CONSENT 348, 381 (Russell & Russell, Inc., reissued ed. 1964). The original is "contra defectus legum originalium, iudicialium, et executoriarum"—the second comma being present in one variant but not another. NICHOLAS PRONAY & JOHN TAYLOR, PARLIAMENTARY TEXTS OF THE LATER MIDDLE AGES 75, 108 (1980). This is translated in the 1980 edition as "against the defects of customary law, the law of the courts and the executive"—apparently on the assumption that "legum" is used here in contrast to "lex." *Id.* at 88. In the entire *Modus*, however, the word "lex" is not used at all, and "legum" is used only in this instance. *Id.* at 65–79, 101–14. Hence, the interpretation followed here.

On the Continent, this tripartite division of government powers was espoused as early as ca. 1315 by Hervaeus Natalis. *See* BRIAN TIERNEY, RELIGION, LAW, AND THE GROWTH OF CONSTITUTIONAL THOUGHT 1150–1650, at 45 (1982); Brian Tierney, *Hierarchy, Consent, and the "Western Tradition"*, 15 POL. THEORY 646, 649 (1987).

Underlying these ideas about the tripartite powers of government were even more profound ideas about the powers or faculties of individuals. Will and judgment were understood to be faculties of the soul, and alongside these two mental faculties—or powers of the mind—was the physical power of the body. *See* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 148, 159 (2008). From these notions about the power of individuals, the English and then Americans developed their ideas about the will, judgment, and force of the body politic. *See id.* at 148–78; *see also, e.g.*, THE FEDERALIST NO. 78, *supra* note 56, at 523 (discussing government's will, force, and judgment).

148 M. J. C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 31, 60 (2d ed. 1998) (discussing the views of the seventeenth-century writer George Lawson that the judiciary was headed by the ruler).

exercise independent judgment and that they should be considered merely part of the executive.[149]

By the end of the seventeenth century, however, the ideal of independent judgment was beginning to displace the fear of deference to executive power, thus leading to the conclusion that judges enjoyed a separate power.[150] Chief Justice Holt, for example, said in 1705 that "the people" elected their representatives with "power and authority to act legislatively, not ministerially or judicially."[151] This sort of assumption—that judicial office or power was separate from both legislative and executive power—increasingly became conventional. Montesquieu prominently theorized it, and Americans repeatedly recited it in their pamphlets, sermons, and newspaper essays.[152] This assumption became the foundation of the judicial authority established by the U.S. Constitution. The colonists struggled to ensure that their judges would not defer to their governors or to the Crown, and after independence from Britain, judges in the United States were independent from any deference to executive power.[153] No longer tools of the executive, judges in the United States enjoyed a separate governmental power.

Although often discussed merely as an institutional formality, this separation of powers is profoundly personal. Ultimately, it comes to rest on the individual commitment of each judge, who undertakes in his office to exercise his own independent judgment.

Judges now, however, defer to the executive's judgment of the law and thereby shift their judicial power back toward the executive. It is as if the worst of the seventeenth century has returned to life, for in giving up their own judgment and relying on the executive's judgment, the judges make their judicial power a part of the executive power.[154]

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149 *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 325 (Peter Laslett ed., Cambridge Univ. Press, student ed. 1988).

150 VILE, *supra* note 148, at 34.

151 *In re* Case of Paty (Q.B. 1705), *in* THE JUDGMENTS DELIVERED BY THE LORD CHIEF JUSTICE HOLT IN THE CASE OF ASHBY V. WHITE AND OTHERS, AND IN THE CASE OF JOHN PATY AND OTHERS 41, 60 (London, Saunders & Benning 1837).

152 *See* PAUL MERRILL SPURLIN, MONTESQUIEU IN AMERICA 1760-1801, *at* 16–17 (2d ed. 1969); Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189, 195–96 (1984).

153 The colonial struggles for the independence of their judges from the Crown can be illustrated by the Massachusetts controversy over Chief Justice Peter Oliver. *See* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 513–14 (2008).

154 In *Hayburn's Case*, the judges long ago recognized that if they were to allow subsequent executive review of their decisions by an executive officer, this would compromise their indepen-

Of course, their personal failure to live up to their office of independent judgment does not formally alter the structure of government. Institutionally, there remain three separate branches of government. But in deferring to the judgment of the executive about what the law is, judges alter the real structure of government, shifting the judicial power back into the executive. Sadly, John Locke's fears have proved accurate—not only in premodern England, but also in contemporary America.

C. *Legislative Interpretation*

Another way of understanding the depth of the problem is by asking whether judges can defer to legislative interpretation. The justification for deference to administrative interpretation is that Congress, through the indeterminacy of its statutes, has authorized agencies to interpret the statutes.[155] But if the judges cannot defer to Congress's interpretation of its statutes, how can they defer to any executive or other agency interpretation of such statutes?

Historically, both in England and in the American states, it was understood that, although a legislature could bind the people through a statute, its interpretation of the statute was not authoritative.[156] Similarly, although Congress can enact law, it cannot issue authoritative interpretations.[157] If Congress, to clarify the meaning of one statute, were to interpret it by adopting another that specified what

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dence. Hayburn's Case, 2 U.S. (2 Dall.) 409, 409 (1792). Nowadays, however, in their administrative decisions, judges defer to prior executive interpretation without even worrying about the threat to their independence. Whether the executive displacement of the judicial role comes afterward or beforehand, there is a loss of independent judgment.

155 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit.").

156 For England, *see* CHRISTOPHER HATTON, A TREATISE CONCERNING STATUTES, OR ACTS OF PARLIAMENT: AND THE EXPOSITION THEREOF 28–30 (London, 1677); W. FLEETWOOD, THE OFFICE OF A JUSTICE OF THE PEACE, TOGETHER WITH INSTRUCTIONS, HOW AND IN WHAT MANNER STATUTES SHALL BE EXPOUNDED 98 (London, Ralph Wood 1658); *see also* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 220–21 (2008). After the Pennsylvania judges punished the editor Eleazer Oswald in 1788 for contempt of court, Oswald petitioned the state's Assembly to impeach the judges, and William Lewis—a lawyer and member of the House—prominently and successfully argued that "the legislative power is confined to *making* the law, and cannot interfere in the *interpretation*; which is the natural and exclusive province of the judicial branch of the government." Respublica v. Oswald, 1 U.S. (1 Dall.) 319, 329 (1788) (emphasis added). Moreover, "the courts of justice derive their powers from the constitution, a source paramount to the legislature; and, consequently, what is given to them by the former, cannot be taken from them by the latter." *Id.*

157 *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain

Congress meant, its second statute would be binding as a statute modifying the first, not as an interpretation authoritatively revealing the prior meaning of the earlier statute. In practical terms, judges would apply the second statute from the time of its enactment, but would not defer to it as interpretation—as evident from the fact that they ordinarily would not apply it to circumstances arising before the second statute was adopted.

All of this follows not only from Congress's lack of a power to make authoritative interpretations, but also from the judges' office or duty of independent judgment. The judges must reach their own judgments about what the law is, and therefore, quite apart from Congress's lack of interpretative power, they cannot defer to congressional interpretation. Although they must recognize the congressional power to make law, they must reach their own judgments about interpretation—about what the law is.[158]

If judges thus cannot defer to congressional interpretations of statutes, how can they defer to agency interpretations of statutes? Although Congress at least might have special insight into the meaning of an ambiguous statute, judges cannot defer to its interpretation. And if they cannot defer to Congress's interpretation, they cannot defer to the executive's interpretation.

Most concretely, the problem is that the judges have an office or duty of independent judgment about what the law is and that the people have a due process right to unbiased judgment. Judges therefore cannot defer to the judgment of either Congress or the executive. It does not matter which nonjudicial body is interpreting the law or how it does so; nor does it matter whether Congress has given the Executive or anyone else authority to interpret the law. Regardless, judges must exercise their own independent judgment about what the law is and must not violate the due process of law by engaging in systematic bias.

The obstacles to deference to congressional interpretation thus reveal the seriousness of the problems with deference to executive interpretation. Neither sort of deference is constitutional.

D. The Danger of Deference to Administrative Interpretation

The danger of deference to administrative interpretation is most profound in cases between Americans and their government. In this

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and establish."); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

158 *See Marbury*, 5 U.S. (1 Cranch) at 177.

context, the deference directly threatens the legitimacy of the entire government.

The independent judgment of unbiased judges is the basis of the government's political legitimacy.[159] In all cases, and especially those concerning the power of government or the rights of the people, it is essential that the people have confidence that the judges are not biased toward government, but are exercising independent judgment. Only when it is clear that the judges are exercising unbiased independent judgment, can the people be expected to rest content with unfavorable decisions. The independence of judges, without deference to government, was thus the foundation for modern government under law, in which the people can be expected to channel their discontents into litigation rather than revolution.[160]

In contrast, as John Locke recognized, when the people cannot find "indifferent" judges to resolve disputes between themselves and their government, they must exercise their own judgment.[161] And even if the government objects—for example, on the ground that the people thereby are acting as judges in their own case—the people nonetheless, as put by Locke, have a right to make an appeal to God.[162] In other words, when judges do not exercise independent judgment, but instead defer to the government, the people have a right to embrace revolution.[163]

Therefore, the judges and, more generally, the nation cannot afford judicial deference to administrative interpretation of law. What in the seventeenth century was judicial deference to royal or prerogative interpretation has nowadays become judicial deference to executive or administrative interpretation, and although the deference this time has not yet provoked revolution, it again is beginning to stimulate widespread repugnance.

Judicial deference to administrative interpretation is thus very dangerous. It revives a power rejected by the judges in the times of James I; it treats executive interpretation in a way judges would never treat congressional interpretation; it restructures the government by shifting judicial power back into executive power; and, last but not least, it compromises the essential role of judges as independent arbi-

159 Philip A. Hamburger, *Revolution and Judicial Review: Chief Justice Holt's Opinion in* City of London v. Wood, 94 COLUM. L. REV. 2091, 2134–36, 2153 (1994).

160 *Id.*

161 LOCKE, *supra* note 149, at 426–27 (II.xix.240).

162 *Id.* at 427 (II.xix.242) ("[T]he Appeal lies only to Heaven.").

163 Hamburger, *supra* note 159, at 2136, 2153.

ters between the government and the people, thereby undermining the very legitimacy of government.

V. NOT A CHALLENGE TO PRECEDENT—WITH ONE POSSIBLE EXCEPTION

Incidentally, it should not be thought that this Article's argument against judicial deference to administrative interpretation goes so far as to question judicial deference to precedent. Deference to administrative interpretation and deference to judicial interpretation are very different, and this Article's critique of the one therefore does not imply any doubt about the other. The only possible exception is where precedents (such as *Chevron* and *City of Arlington*) require judges to abandon their very office as judges or to engage in clear violations of constitutional rights.

A. Very Different

The argument here against deference to administrative interpretation is no threat to deference to precedent because the two types of deference are very different. When judges defer to judicial interpretation, at least the initial judgment about the law is made by judges—that is, by the persons to whom the Constitution has committed the office of independent judgment, and who thus have the office, in their cases, of giving authoritative interpretations.[164] In contrast, when judges defer to administrative interpretation, persons who are not judges, who do not have an office of independent judgment under the Constitution, and who thus do not have an office of giving authoritative interpretations, make the initial judgment about the law. Accordingly, although judges cannot defer to administrative interpretation, it does not follow that they cannot defer to judicial interpretation.[165]

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164 For the historical and logical connection between the office of judgment and the authority to expound the law, see PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 218–34, 543–54 (2008).

165 Of course, ideas of precedent have developed over the centuries, and this has reinforced the obligation of judges to follow precedent. Traditionally, in the seventeenth through nineteenth centuries, precedent was often understood merely as evidence of the law. PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 228–31 (2008). For a host of reasons, however, primarily the development of layers of courts, ideas of precedent have changed to something that leaves less room for independent judgment, at least for lower court judges. This shift could be viewed as adding an institutional qualification to the office or duty of a judge to exercise independent judgment. One way or another, the deference of a judge to an executive agency's interpretation of the law is very different from the deference of a judge to the prior judgment about the law by another judge.

In terms of governmental powers, judicial interpretation comes from the branch that has constitutional authority to exercise judgment, including authority to exercise judgment about what the law is. Administrative interpretation, however, comes mainly from the branch of government that has constitutional authority to exercise force for the government, not judgment. Judicial interpretation therefore has an authority that is not enjoyed by administrative interpretation, and the question of deference to the one is therefore very different from the question of deference to the other.

In terms of due process, judges engage in systematic bias when they defer to administrative interpretation, but not when they defer to precedent. When judges defer to prior judicial interpretation, they may be biased toward their own branch of government, but they are not exhibiting systematic bias toward one of the parties in their cases. When judges defer to administrative interpretation, however, they often are deferring to one of the parties, and they thereby systematically favor one party. Indeed, they shamelessly announce this precommitment as judicial policy.

The two types of deference are thus very different, and the arguments against deference to administrative interpretation therefore do not threaten deference to precedent. The deference to prior judicial interpretation at least is deference to the judgment of someone with the constitutionally established office of a judge and thus someone with authority to expound the law. In contrast, the deference to administrative interpretation is deference to the judgment or will of someone without such authority.[166] And it often is deference to one of the parties, thus making this sort of deference mere prejudice.

B. Can Judges Follow Precedents That Require Them to Abandon Their Office as Judges?

The judges, who must worry about abandoning their office of independent judgment, and about violating the due process of law, are

166 This distinction—between deference to judicial interpretation and deference to royal or executive interpretation—has deep historical foundations in the assumption that judges have an office of judgment, not of will. According to Bacon's *Abridgment*, "[t]he Judges are bound by Oath to determine according to the known Laws and ancient Customs of the Realm; and their Rule herein must be the Judicial Decisions and Resolutions of great Numbers of learned, wise and upright Judges, upon Variety of particular Facts and Cases, and not their own arbitrary Will and Pleasure, or that of their Prince's." MATTHEW BACON, 1 A NEW ABRIDGMENT OF THE LAW 555 (4th ed., London, W. Strahan & M. Woodfall 1778). (Although this passage was an adaptation of a passage in JOHN LORD FORTESCUE, REPORTS OF SELECT CASES iii (London, n. pub. 1748), this Article quotes Bacon's *Abridgment* because it was the leading legal abridgment or encyclopedia used in eighteenth-century America.).

not only Supreme Court Justices, but also lower court judges, which brings the constitutional question down to earth. Lower court judges generally feel obliged to follow higher court precedent, and this leads to the question of whether they should feel bound by precedents such as *Chevron* and *City of Arlington*. Even if they generally ought to follow precedents, can they really follow these sorts of precedent, which require them to give up their office of independent judgment and to engage in systemic bias?

Deference to an administrative judgment about the law is not even deference to the judgment of a judge, but instead is deference to the position of one of the parties. Accordingly, when precedents such as *Chevron* and *City of Arlington* asks judges to defer to administrative interpretation, the judges face not merely the question of deference to precedent, but the more serious problem of deference to an interpretation that comes from an entity (the government acting through its executive) that is not a judge—that is the most powerful of parties. Precedents such as *Chevron* and *City of Arlington* thereby require judges to give up their role as judges and require them to violate the due process of law. Even if judges ordinarily must defer to precedents, can they afford to defer to these sorts of precedent, which require them to act in a manner clearly contrary to the Bill of Rights and their very office, duty, and identity as judges?

High court Justices who make such precedents expect deference to their precedents—their judicial interpretations—but can they really ask fellow Justices or lower court judges to defer to the interpretations of a non-judge, let alone a mere party? The problem is particularly forceful for lower court judges. It is one thing to ask lower court judges to defer to the interpretations given by higher court judges, but it is quite another to ask lower court judges to engage in a sort of deference that requires them systematically to favor a powerful party and thereby to violate due process and give up their very status and identity as judges. This is more than any judge can demand from another. It is to demand that other judges clearly violate a procedural right guaranteed by the Constitution and give up the very marrow of their office.

If Supreme Court Justices make such a demand, what should lower court judges do? At one point or another, where precedents go too far astray, they should not be followed, but rejected. Lower court judges need to ask themselves whether that point has been reached when precedents require them to engage in systematic bias and abandon their office of independent judgment.

VI. INTERPRETING AUTHORIZING STATUTES IN THE ABSENCE OF *CHEVRON*

There remains the problem of what judges would do if they did not engage in *Chevron* deference. It often is assumed that if judges do not defer to agency interpretations of profoundly ambiguous authorizing statutes, they inevitably will end up imposing their own policy choices and thereby will run into fractious disputes about matters beyond their expertise.[167] But is this true? Perhaps they can interpret profoundly ambiguous authorizing statutes without engaging in policy-making.

A. Shift to Express and Specific Authorization for Rulemaking

As a practical matter, if *Chevron* were clearly rejected, there would be a shift toward express and specific authorization for rulemaking, as this does not depend on *Chevron* deference. The difficulty of interpreting ambiguous statutes would therefore shrink.

Although agencies initially would attempt to rely on *Mead-Skidmore* deference, this deference suffers from the same constitutional infirmities as *Chevron* deference.[168] Many agencies would therefore eventually seek an expansion of express and specific congressional authorization for rulemaking, and Congress would probably oblige them.[169] In place of relying on ambiguity to convey power to agencies, Congress would increase its express and specific statutory authorization, including substantial statutory detail and clarity about the parameters of the agencies' rulemaking authority. Congress thereby would reduce the judicial burden of interpreting open-ended statutes and would avoid the alleged need for unconstitutional deference to agency interpretations.

Of course, even where a statute expressly and specifically authorized rulemaking and thus avoided the constitutional problems with *Chevron* and *Mead-Skidmore*, courts still would sometimes have to interpret the statutory boundaries of the rulemaking authority. But they would not as frequently face the difficulty of discerning the core meaning of profoundly open-ended statutes.

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167 *See, e.g.*, Herz, *supra* note 50, at 194–96.

168 *See supra* notes 42–43 and accompanying text.

169 Already in the aftermath of *King v. Burwell*, 135 S. Ct. 2480 (2015), when the Supreme Court seemed to have put *Chevron* on hold, the Environmental Protection Agency changed justification for its proposed Clean Power Plan from the theory that the underlying statute was ambiguous, thus giving the agency authority to interpret under *Chevron*, to the theory that the statute clearly gave the agency rulemaking power. Note, *The Clean Power Plan*, 129 HARV. L. REV. 1152, 1153–54 (2016).

The problems faced by judges thus would not remain the same. Judges often seem to cling to *Chevron* for fear they would otherwise face insurmountable difficulties in interpreting ambiguous authorizing statutes. But this fear rests on the mistaken assumption that authorizing statutes would remain static. If *Chevron* were clearly rejected, there is reason to expect that statutes would shift toward express and specific authorization for agency rulemaking. Congress, in other words, would no longer as regularly present the judges with the severe problems of ambiguity that have seemed to necessitate *Chevron* deference.

B. The Modesty of the Duty to Expound

Even when Congress leaves profound ambiguities in its authorizing statues, the judges can deal with the indeterminacy by recognizing the modesty of the traditional duty of judges to expound. Judges have never had a duty to find a meaning for a constitution or statute come hell or high water.[170] Instead, they traditionally had a duty to expound the law—to find and enunciate the law's meaning (as far as necessary to resolve a case)—but not to go so far as to impose a meaning.[171]

From this perspective, as has been explained elsewhere, when judges reach the point at which they no longer can discern the meaning of a statute, they should not attribute meaning to it.[172] In other words, where a statute—considered in its context and with canons of interpretation and other aids to construction—reveals its meaning, judges should expound the statute; but where the statute is so pro-

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170 *See* Philip Hamburger, *Judicial Office*, 6 J.L., PHIL. & CULTURE 53, 68 (2011) ("Sometimes, where the law was uncertain, it might be possible to discern it from reasoning about the law and the circumstances of a case. But when the judges came to the point that they could no longer perceive the law, they had no need to make heroic efforts to develop the law . . . .").

171 *See id.* at 63–65.

172 PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 618 (2008) ("[W]here the intent of a statute or a constitution could not be discerned, it could not be obligatory . . . ."); Hamburger, *supra* note 170, at 68 (regarding law's limited domain, in particular that "when the law of the land came to an end, the judges were simply to stop").

Along somewhat similar lines, Judge Easterbrook observes: "Let us not pretend that texts answer every question. Instead we must admit that there are gaps in statutes, as in the law in general. When the text has no answer, a court should not put one there on the basis of legislative reports or moral philosophy—or economics!" Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994). This Article simply adds: nor should a court put one there on the basis of executive interpretation or policy. Interpretation—the task of saying what the law is—belongs to the judges in their cases, and where there is no meaning, judges should no more impose executive policy than they should impose their own.

foundly ambiguous that it reveals no more meaning, judges should simply stop. At that point, the statute has nothing more to say.

The choices faced by judges are therefore not as difficult as is often assumed. It is commonly taken for granted that if judges were not to defer to agency interpretations, they would have to fill in the details that an authorizing statute omitted. But the judges also have a more immediate path—namely, to conclude that the statute's meaning cannot be further discerned.

In such an instance, the statute is not necessarily unconstitutional. Instead, the judges ordinarily should conclude that they cannot discern any further relevant meaning and that the disputed text does not apply to the case in front of them. Rather than create meaning for such a phrase, the judge should conclude simply that it does not require any more of him.

Of course, this solution still leaves a difficult line-drawing problem: when is an ambiguous authorizing statute so open-ended as to be incapable of further judicial exposition? This line-drawing question is apt to be divisive and troubling. But line-drawing is a familiar problem, and at least for this line-drawing, there is an obvious mode of correction for judicial mistakes. Where judges find a statute so open-ended as to be without pertinent meaning, Congress can easily clarify the statute by adopting an additional statute.

Although the line-drawing here may be particularly difficult, judges cannot avoid it because the alternative is even worse. When judges defer to agency interpretations, they abandon their office of independent judgment and engage in systematic bias, and these dangers, being clear violations of Article III and the Fifth Amendment, are far more serious than the difficulties of wrestling with open-ended statutes.[173] Put another way, it is better for judges to face up to disputes about statutory interpretation than to walk away from their constitutional role and a central constitutional right. The statutory uncertainties will be difficult, but they are no excuse for abandoning what (relatively speaking) are constitutional certainties. The judges thus must wrestle with the difficult statutory questions rather than give up on the Constitution's clear and profound limits on judicial power.

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173 *See supra* Part II.

C. *A More Basic Solution*

The question about the lawfulness of binding agency interpretations (like the almost identical question of agency interpretations of binding statutes) is beyond the scope of this Article, but it is worth adding that this basic problem points to a more basic solution. If ever the courts were to recognize the unlawfulness of binding agency edicts—of agency edicts, including interpretations, that come with legal obligation—the difficulty of interpreting the statutory authorization for such edicts would largely dissipate.

I have argued elsewhere that only Congress and the courts, not agencies, can issue binding edicts—that only Congress can issue binding laws or rules, and that only the courts can issue binding adjudications and authoritative or otherwise binding interpretations.[174] If courts were to recognize this, then litigants would be able to directly challenge binding agency edicts, including interpretations, without regard to the authorizing statutes, and the courts would be able to resolve such litigation without any need to expound the statutes' open-ended words.[175]

Until then, however, courts cannot avoid the question about how to expound authorizing statutes, and the uncertainties of this problem cannot excuse judges from the relative certainties about independence and bias. The cost of expounding the statutes is much lower than the cost of having judges who openly repudiate their constitutional duty of independent judgment and the constitutional right of due process.

VII. PATHS TOWARD INDEPENDENT JUDGMENT

Although the Constitution forbids judicial deference to executive interpretation, what chance is there that the judiciary can correct its path? Until the Supreme Court acts as a coroner and bluntly declares *Chevron* dead, many judges may still consider it binding precedent. How, then, can judges exercise independent judgment and avoid systematic bias? As it happens, judges, even lower court judges, have several paths out of this dilemma.

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174 *See generally* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).

175 Adrian Vermeule assumes that it would be necessary for courts to parse the difference between administrative lawmaking and administrative interpretation. Adrian Vermeule, *No*, 93 TEX. L. REV. 1547, 1560–61 (2015) (reviewing PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014)). But if both the administrative lawmaking and the administrative interpretation were recognized as unconstitutional, then there would no need to elaborate the distinction. *See* Philip Hamburger, *Vermeule Unbound*, 94 TEX. L. REV. 204 (2016).

A. *Narrow View of Precedents That Conflict with Judicial Office*

For starters, judges should recognize that they are confronted with choices. Precedent is not self-explanatory. Therefore, in almost every case, every judge must choose between understanding precedent narrowly or broadly.

There always is a need to interpret precedent, so as to understand where it applies and where it does not. This is especially true where the Supreme Court has suggested that it is abandoning a precedent, but has not yet done so with clarity, thus creating ambiguity that requires judicial interpretation.[176] Lower court judges therefore must exercise their own judgment in determining what precedents such as *Chevron* and *City of Arlington* require.

Even where the Supreme Court is not ambiguous about its precedents, lower court judges must consider how these precedents can be understood in a manner compatible with the Constitution. For example, such judges need to reconcile the precedents with the Constitution's barriers to administrative power—barriers that include the Constitution's grant of all legislative powers to Congress, its grant of judicial power to the courts, and its guarantees of procedural rights.[177]

More immediately, lower court judges must reconcile precedent with their judicial office and the right of due process. The Constitution establishes courts staffed with judges, who have an office in which they must exercise their own independent judgment and must not deny the due process of law. Accordingly, where precedents require lower court judges to defer to executive judgments about the law, the judges need to interpret the precedents as narrowly as possible. To the extent possible, the precedents should be interpreted to allow judges to exercise their own independent judgment and to avoid denying due process to the parties.[178]

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176 *See* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 232–33 (2012) (describing the difficulty lower courts face when "the Supreme Court in case A clearly says X, but later cases B, C, and D, involving issues related to but not identical with the issue in case A, seem to point away from X").

177 U.S. CONST. art. I, § 1; *id.* art. III, § 1; *id.* amend. V.

178 In this regard, the Supreme Court's decision in *King v. Burwell* is instructive. Rather than give *Chevron* deference to the regulations in that case, the Court held that the regulations fell within the major questions doctrine, and the Court itself interpreted the statute. King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015) (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)).

B. Role of Lower Courts in the Development of Doctrine

Lower court judges additionally should keep in mind that their independent judgment has an important role in the development of legal doctrine. There are good reasons for judicial deference to higher court precedents, but at the same time, lower court judges make important doctrinal contributions.

Of course, lower courts must submit to the orders of higher courts. The office of a lower court judge requires him to obey such orders. But the interpretations of law that are found in higher court precedent are a more complex matter. These are not orders to lower court judges, but rather are the judgments of higher court judges about what the law is, and the interesting problem is that lower court judges have as much of a duty as higher court judges—an equal duty—to exercise their own independent judgment about the law.[179]

This independent exercise of judgment by lower court judges matters for many reasons, and it is valuable even for higher courts. Just as higher courts must do their best to correct lower court errors, so too must the lower courts wrestle with the errors of the higher courts. Of course, lower court judges have more of an uphill struggle, as they typically must follow higher court precedents. At the same time, they have an underlying duty as judges to exercise their own independent judgment in accord with the law—not least, in accord with due process—and when they thereby question erroneous precedents, they can give higher courts a chance to reconsider and adjust their doctrines.[180]

In other words, the upward pressure of independent judgment relieves some of the downward costs of erroneous precedent. Precisely by adhering to their duty of independent judgment, lower court judges can serve their function of loosening up erroneous doctrine. The diffi-

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179 It has long been understood that all judges, however lowly, have the office or duty of a judge, including the duty to exercise independent judgment. When James Iredell in 1786 defended the duty of courts to hold unconstitutional statutes unlawful, he noted the objection that county courts might have this power, and then responded that this exercise of power, by mere justices of the peace, was inevitable: "But it is said, if the Judges have this power, so have the County Courts. I admit it. The County Courts, in the exercise of equal judicial power, must have equal Authority." Iredell, *supra* note 63, at 230. Similarly, today, all judges, even lower court judges, have an office or duty to exercise their own independent judgment.

180 *See* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 817–24 (1994) (recognizing how lower court departures from precedent can spur higher courts to reconsider their doctrine, but skeptical as to whether this role of lower courts should be stated as a general rule).

culty is to understand how they can take this path without undermining the uniformity of decisions.

C. *Speaking Out in Opinions*

An especially modest and therefore appealing solution comes in the distinction between judicial orders and judicial opinions. Even when lower court judges feel bound by precedent to defer to administrative interpretations, they should recognize the difference between their orders and their opinions. In their orders, they may feel obliged to follow precedent, but in their opinions they remain free—they are bound by duty—to expound the law with candor.

Although lower court judges usually must follow precedent, they also have a duty to expound the law—to say what the law is. The judges' duty to explain their holdings in cases, and thus to expound the law, is an application or corollary of their more basic duty to exercise their independent judgment in accord with the law of the land. Their duty to say what the law is therefore rests at the heart of their office.

It thus would seem that honesty is the only path compatible with their office, including when they must follow precedent that is in conflict with the law.[181] If judges fail to be honest about what the law is, they will lose the confidence of other judges, of lawyers, and of the people. Honesty thus is also good policy. Accordingly, even where lower court judges feel bound by precedents to defer to administrative interpretation in their cases, they still can and should explain how the precedents interfere with their judicial office and duty and with their compliance with due process.

It is one thing to follow precedent, but quite another to misexpound the law. Put another way, it is one thing to preserve the uniformity of law across the United States by following the interpretations of higher court judges, but quite another to mislead the people of the United States, to fail to inform higher court judges about the erroneous character of their precedents, and to abandon the judicial duty to expound the law by failing to state the law honestly. This clearly would violate the duty of a judge. As Chief Justice Marshall said in *Marbury*, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[182] Therefore, even

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181 *Cf.* AMAR, *supra* note 176, at 232–33 (explaining how lower courts, in the case of ambiguous Supreme Court precedent, should "note the . . . tension" between the original case and subsequent cases that point away from, but do not explicitly overrule the original case).

182 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Note that all judges had this

when following what they consider mistaken precedent, judges at least must be honest about what the law is.

One might think that any such honesty is a frolic and detour—a departure from the duty of judges to confine their expositions of law to holdings in cases. Where, however, a judge follows a precedent that he considers a departure from the law—in this instance, a profound departure from the law—he can honestly explain his decision only by observing the difference between the precedent and the law and by explaining the considerations that lead him, nonetheless, to follow the precedent. This candid explanation falls entirely within the narrow task of explaining judicial decisions, and the narrowness of the task thus cannot justify judges in being less than honest about the law.

Judges are deeply constrained—not least, in being bound to follow precedent when they issue orders resolving their cases. But more fundamentally they are bound by law, including the fundamental law establishing and limiting their office. In pursuit of their office as judges—and in defense of their duty of independent judgment and the right of due process—they are free, even obliged, to speak out in their opinions.

D. Realties, Resignation, and Judicial Identity

Whatever judges do, they need to recognize the realities of deference. No amount of Supreme Court authority can disguise the reality of what judges must do under cases such as *Chevron* and *City of Arlington*. The judges candidly defer to executive and other agency judgments about the law, and in bowing to such interpretation, the judges abandon their very office and duty as judges and embrace systematic bias.

This deference is one of the most dramatic departures from the ideals of judicial office and due process in the history of the common law. Even in the Middle Ages, judges largely preserved their independent judgment and generally refused to defer, and Parliament repeatedly insisted on judicial independence and the due process of law.[183] In the seventeenth century, at least some of the judges laid foundations for the development of constitutional law by asserting that, by virtue of their office, they had a duty, steadfastly, to exercise their own

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duty and that Chief Justice Marshall therefore spoke about the entire "judicial department," not merely the Justices of the Supreme Court. *Id.*

183 PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 149–51 (2008).

independent judgment.[184] And by the end of the century, the entire bench understood that it was expected to avoid bias in favor of the government.[185] Undoubtedly, the current judges assume that they are continuing in this venerable tradition, but in fact every time they defer to administrative interpretation, they violate the most fundamental requirement of their office and deny one of the most basic of procedural rights.

The first Canon of judicial conduct declares: "An independent and honorable judiciary is indispensable to justice in our society."[186] The commentary observes that "[d]eference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges."[187] On this reasoning, if judges want public deference, they must avoid *Chevron* deference. In the meantime, the latter "diminishes public confidence in the judiciary and injures our system of government under law."[188] The third Canon states that a judge "shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which . . . the judge has a personal bias or prejudice concerning a party . . . ."[189] What is true of personal bias is also true of institutional bias. The judges cannot systematically defer to the interpretation or legal position of one of the parties before them without denying justice to other parties and undermining their own reputation for justice.

Ultimately, if judges do not want to exercise their own independent judgment, but instead want to exercise systematic bias, they should resign. Judges take an oath of office, in which they swear to serve as judges—that is, to exercise their own independent judgment in accord with the law of the land, including Article III and the Fifth Amendment.[190] And precisely to preserve their capacity to exercise this sort of unbiased independent judgment, they are constitutionally

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184 *Id.* at 103–41.

185 *Id.* at 176–77.

186 JUDICIAL CONFERENCE OF THE U.S., CODE OF CONDUCT FOR UNITED STATES JUDGES (2014), http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges.

187 *Id.*

188 *Id.*

189 *Id.*

190 28 U.S.C. § 453 (2012) ("Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: 'I, ___ ___, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ___ under the Constitution and laws of the United States. So help me God.'"); *see supra* Sections II.A–II.B.

protected in their tenure and their salaries.[191] It therefore is not too much to expect that, if they are to stay on the bench, they should avoid systematic bias and should exercise their own independent judgment. If, on the other hand, they are unwilling to adhere to these most basic requirements, they have no business pretending to be judges and should get off the bench.

The judges accordingly need to ask themselves profound questions about who they are and what they are doing. The office of a judge is one of independent judgment, not one of deference, special respect, or other bias toward the most powerful of parties. Therefore, even if merely to preserve their identity as judges, the judges must forsake their deference to executive and other administrative judgments about law. The office of a judge can be very lonely. Particularly in a republic, in which a desire for the approval of a majority tends to affect judgment, there is a danger that even relatively independent judges will be influenced by majority opinion. But this danger does not even come close to the danger from their bowing to administrative interpretation.

CONCLUSION

The standard question about deference to administrative interpretation focuses on the statutory authority for agencies. To understand judicial deference, however, it is necessary to ask the constitutional questions about judges—about their office or duty to exercise independent judgment and about their systematic bias in violation of the right of due process.

Of course, if judges cannot defer to an agency's interpretation of its authorizing statute, they will face difficult questions about what to do with agency interpretations. These difficult statutory questions, however, are no excuse for failing to confront the less difficult constitutional questions raised here.

First, whatever the statutory extent of an agency's power to interpret for its purposes, judges have the constitutional duty to interpret for purposes of deciding their cases. The Constitution vests judicial power in the courts, and it staffs the courts with judges—that is, with persons who have an office of independent judgment. Judges, in adju-

191 U.S. CONST. art. III, § 1. For a discussion on how the constitutional protections are merely external bulwarks for the internal exercise of independent judgment, see PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 148–78, 507–21 (2008) (describing how, in both England and America, external guarantees of independence protected the internal independence of the judges).

dicating their cases, thus have the duty to exercise their own independent judgment about what the law is, including their own independent judgment about the interpretation of the law. Accordingly, when judges defer to agency judgments about statutory interpretation, the judges abandon their very office or duty as judges. They make a mockery of their office, reducing it from a posture of independent judgment to a posture of bowing to power.

Second, the Constitution prohibits judges from denying the due process of law, and judges therefore cannot engage in systematic bias in favor of the government. Nonetheless, judges defer to administrative interpretation, thus often engaging in systematic bias for the government and against other parties.

In cases such as *Chevron*, the judges candidly declare their abandonment of judicial office and their embrace of systematic bias. What are Americans to think when their judges openly declare such things? When the judges brazenly tell Americans that they cannot get unbiased independent judgment in the courts, is it surprising that Americans become suspicious of the judges and the rest of the government? And if Americans, in their disagreements with the government, cannot find unbiased independent judgment in the courts, will it be surprising if they seek justice in other ways?

The judges thus are playing a dangerous game. The availability of judges who exercise their own independent and unbiased judgment, without deference, is the foundation of American government, in which conflict is resolved by law rather than force, and in which conflicts about the law are decided by the judges. Without what Locke called "indifferent judges," the people are apt to become their own judges—that is, they eventually will be tempted to take judgment into their own hands.[192] And who then will be in a position to say they are unjustified? Certainly not the judges.

Although deference to administrative interpretation is only part of the judiciary's involvement with administrative power, it illustrates a broader problem with such involvement—that it corrupts the judiciary. Judges during the past century have in myriad ways participated in administrative power, to ensure both its efficiency and its legitimacy, and this has had consequences not only for administrative power, but also for the judges. Rather than worry about maintaining administrative power, judges need to worry about their own role; in

192 *See supra* notes 161–63 and accompanying text.

this instance, about the unlawfulness of their deference and the consequences for them and the entire government.

In the end, it must be hoped that the judges themselves will solve the dangers of deference. Although they undoubtedly will continue to enjoy the robes of their office, they need to decide whether they will fill those robes. Under the Constitution, they must exercise an office of independent judgment and must avoid systematic bias in violation of due process, and if they fail to meet these most basic requirements, they will have little right to public respect or even self-respect.